Hearings were begun in 1962, but in the midst of the hearings, the Pact members filed additional amendments to the Pact. Basically, these amendments provided for additional "supplemental payments" to a struck carrier. They guaranteed a carrier member would receive 25% of its normal air transport operating expenses for flight operations shut down because of a strike. The additional payments over "windfall" necessary to meet this guarantee would be contributed by each member in proportion to its air transport operating revenue for the prior year to the total revenue for all members. A maximum annual liability for each member of one-half of one percent of the prior year's air transport operating revenue was also provided.

After an Initial Decision by Examiner S. Thomas Simon, the CAB approved the amended Pact for three years, in July 1964. *Mutual Aid Pact Investigation*, 40 C.A.B. 559 (1964). Vice Chairman Murphy dissented in part and member Minetti dissented.

In May 1967, the Pact members again requested CAB approval for extension of the Pact. The CAB ordered an additional evidentiary hearing before renewal. Order E-26000 (1967). Following hearings, the Initial Decision of Examiner Arthur S. Present of March 1969 approved renewal; but before the CAB could render a final decision, the Pact members, in October 1969, made further significant changes to the Pact which:

1. Increased the "supplemental payments" of 25% of normal air transport operating expenses, for flight operations shut down, to:

–50% of such expenses during the first 14 days of the strike;

—45% of such expenses during the next 7 days of the strike;

—40% of such expenses during the next 7 days of the strike;

—35% of such expenses during the remaining days of the strike.

2. Increased the maximum annual liability of every Pact member from one-half of one percent to one percent of air transport operating revenues for the calendar year preceding the strike.

3. Eased entry for new members, lengthened the period for withdrawal notice and provided for more extensive arbitration of disputes.

In July 1970, the Board approved the amended Pact, with members Murphy and Minetti dissenting. Order 70-7-114 (1970). However, in November 1970, the Board, upon reconsideration, vacated that Order and remanded the proceeding to Examiner Present for further evidentiary hearings. Order 70-11-110 (1970).

In December 1970, there was another Pact amendment permitting local service carriers to join the Pact for the first time. As a result of the various Pact amendments, all truck carriers except Delta Airlines, Inc., and all local service carriers, except Allegheny Airlines, Inc. and Southern Airways, Inc., became Pact members, bringing virtually the entire scheduled airline industry together under the Pact.

The reopened hearing before Examiner Present centered on the record of actual experience while the 1969-1970 amendments were in effect. That experience included three

of the longest strikes in airline history—a 119-day National Airlines-Airline Employees Association dispute, a 160-day strike by the Brotherhood of Railway and Airline Clerks against Northwest Airlines, and a 154-day Mohawk Airlines pilot strike. In the four 1970-1971 strikes (National, Northwest, TWA, Mohawk) total Pact benefits were $83,585,000, including $49,688,000 in supplemental payments.

After this evidentiary hearing, Examiner Present issued a decision approving the Pact as not adverse to the public interest or in violation of the Federal Aviation Act, but disapproving the 1969-1970 amendments to the Pact with respect to supplemental payments, increased carrier liability and local service carriers. However, on February 23, 1973, the CAB, although adopting the findings and conclusions of Examiner Present, except as modified or inconsistent with its opinion, approved the Pact and the 1969-1970 amendments for a five-year period, with members Murphy and Minetti dissenting in part. Order 73-2-110 (1973).

On appeal, pursuant to 49 U.S.C. §1486, the Court of Appeals for the District of Columbia held that the Mutual Aid Pact, as amended, was consistent with national labor policy and that the Board's approval of the Pact was based on findings which were adequately supported; it affirmed the decision of the CAB.

The Allied Pilots Association ("the APA") is a labor organization representing only the pilots on American Airlines, Inc. It is not affiliated with any other union nor with the AFL-CIO. Collective bargaining covering American Airlines' pilots takes place directly between the APA and American Airlines.

REASONS FOR GRANTING THE WRIT

POINT I

The Civil Aeronautics Board has assumed congressional powers and exceeded its authority in deliberately altering the balance of economic power between labor and carriers.

Under Section 412 of the Federal Aviation Act, 49 U.S.C. §1382, the CAB was required to disapprove the Mutual Aid Pact if it found the Pact "to be adverse to the public interest, or in violation of this Act * * *." A finding that the Pact violates the Railway Labor Act would require disapproval of the Pact as 49 U.S.C. §1371 expressly requires that carriers comply with the Railway Labor Act as a condition of holding a CAB certificate.

The CAB's approval of the Mutual Aid Pact bears directly and decisively on the fundamental social and political issue of the balance of economic power between labor and management in the airlines industry. The Board's opinion is replete with findings and comments that such is the purpose and effect of its actions. Brief for Petitioner at 6. At the same time the Board has no reservations about the fact that labor relations policy is an area outside its expertise. *Union of Professional Airmen* v. *Shawnee Airlines*, Order 73-3-43 (1973). Although the Board has neither power to direct carrier labor relations nor expertise to pass judgment, it does have a responsibility not to take action which is inconsistent with national labor policy and the courts have the responsibility of enforcing that limitation. *Burlington Truck Lines* v. *United States*, 83 S.Ct. 239,

248 (1962).* During the long course of the proceedings culminating in the present Pact, the Board has never given proper consideration to the unique character o' the Railway Labor Act which is perhaps the most thoroughly and openly negotiated piece of legislation ever enacted.

In testifying on the legislation, Donald R. Richberg, counsel for the Organized Railway Employees, stated:

> "I emphasize at the outset that this is an agreement not in any way as seeming to attempt to coerce your judgment by the fact that the parties here have agreed upon what they are presenting, because they are seeking legislation for which you have your public responsibilities, not for the purpose of in that manner influencing your judgment, but for the purpose of pointing out at the outset the nature of the proposed law which is here presented for your sanction."**

His views were echoed by A. P. Thom, General Counsel of the Association of the Railway Executives, who stated:

> "Mr. Chairman, you will readily appreciate that in reaching an agreement on so controversial a matter as the varying interests between the carriers and their employees naturally present, it was necessary for both parties to make concessions as to what might be inserted in the agreement. Both parties did make concessions. This bill as presented here is not just such a bill as labor would have written if it could write its own bill—it is not such a bill as the carriers would have written if they could write their own bill. But it is the

* Hearings on H.R. 7180 Before the Committee on Interstate Commerce, 69 Cong., 1st Sess., at 9 (1926) [hereinafter cited as 1926 Hearings on H.R. 7180].

** 1926 Hearings on H.R. 7180 at 11.

> view on which they were able finally to agree to present to the Congress of the United States as a method that would work in preventing interruptions of commerce and in preventing any sacrifice of the public's interest."*

Mr. Thom went on to point out how accommodation had been reached between labor and management on specific provisions of the Railway Labor Act:

> "I was saying that there were matters in this bill which were probably not entirely satisfactory to one party, and other provisions in the bill probably not entirely satisfactory to the other. The bill has been brought into existence by a method of give and take. For example, take section 10 of this bill, which relates to the fact-finding body. That was one of the matters most seriously treated in these negotiations and about which there was the most difficulty in reaching an agreement."**

> "We made the concession of not going further in section 10 than it is now written into the law, and we advocate to you that you do not require us to go further, not only as a matter of loyalty to an agreement but as a matter of judgment of what is best for the country.
>
> "We say to you that an agreement between the parties is worth more than any additional coertion you might write into that action * * *."**

If anything, the concern among the Congressmen was that the legislation was so clearly a product of labor-management cooperation that it might foster bargaining agreements at the expense of the public interest. See *e.g.*, colloquy between Senator Dill and D. B. Robertson, President

* 1926 Hearings on H.R. 7180 at 115.

** 1926 Hearings on H.R. 7180 at 116-117.

of Locomotive Firemen and Engineers, 1926 Hearings on H.R. 7180 at 4.

In face of these misgivings Labor and Management urged and Congress heeded the appeal that there be no tinkering with the agreed legislation.

> "Mr. Newton. I agree with you, but I also feel this, that this legislative child comes here sponsored by two rather worthy parents, vouching that it is the best child ever and that 'the child' will work."
>
> "Mr. Thom. Don't put a different child on the doorstep of the public."
>
> "Mr. Newton. And expect it to perform like the original child."*

See also Statement of Donald Richberg, Hearings on S. 2306 Before the Committee on Interstate Commerce, 69th Cong., 1st Sess., at 89 (1926) [hereinafter 1926 Hearings on S. 2306].

Mr. Richberg characterized the final legislative product in the following words:

> "It is all a part of the machinery. You can not write a clause here which will affect a party of this machinery which will not affect the rest of the machinery. You can not write a clause which will affect the operation of a part of the machinery which will not affect the operation of the rest of the machinery. It is just about as wise to add a little to this law on the basis of 'Well, this will not affect the rest of it', as to add to a radio on the same basis. Somebody might come along and say 'You had better add another battery here,' or 'It needs another wire here.' The result will be that you will throw your delicately balanced radio

* 1926 Hearings on H.R. 7180 at 383.

out of commission. *The situation here is that we have a delicately balanced piece of machinery to insure both parties a fair and equal opportunity to press their point of view home to insure adequate public intervention and adequate public pressure on the parties to the agreement"* (*emphasis added*).*

Our primary point is that, without practical expertise or legislative warrant, the CAB has presumed to throw a monkey wrench into that "delicately balanced piece of machinery" which "is the culmination of 81 years of experience with Federal legislation to govern the labor relations" in the railroad and airline industries.** Both by legislative history and by its own terms the first purpose of the Railway Labor Act is "to avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. §152(1). The Board admits that mutual aid payments "may well" prolong interruptions to air commerce but it contemplates other benefits. The right to even make such a judgment is neither the right nor the role of the Board. There is no question but that this Mutual Aid Pact could not be implemented without the affirmative action of the CAB. See Appendix D, Order 73-2-110 at 107-108.

When Congress approved the extension of the Railway Labor Act to the airline industry in 1936, no "mutual aid" pact existed. Congress accepted the industrial balance of economic strength as it existed and cannot be deemed to have delegated to the Civil Aeronautics Board the power to change that balance. Clearly such a change must take

*1926 Hearings on S. 2306 at 182.

**National Mediation Board, Administration of the Railway Labor Act by the National Mediation Board, at 1 (1970).

place by affirmative government—both because of the essential political character of such action and because Congress intended to reserve this kind of power to itself. This was precisely the view of the Board itself when with a different membership and a far more limited Pact before it, it ruled on the *Six Carrier Mutual Aid Pact* in 1969 saying, 29 C.A.B. 168, 173:

> "We next turn to the question whether the agreement threatens, by aggravation of labor disputes to hinder achievement of the objectives set forth in Section 102 of the Federal Aviation Act. The public interest which we must guard, though not broadly one of employee welfare, includes attainment of a degree of stability and efficiency in air transportation that freedom from industrial strife will provide."
>
> "The range of our inquiry, however, is limited to a determination of the effect of the agreement upon these statutory objectives. Matters of general policy as to labor disputes are not to be considered by the Board in assessing whether the agreement is adverse to the 'public interest'. It is the function of Congress, and not of the Board, to weigh the wisdom of such agreements as a factor in the furtherance of labor policies not directly related to the promotion of a sound air transportation system."

The effect of the Board's approval is to encourage, if not force, multi-carrier bargaining in the airline industry. This is contrary to the design for representation which is quite clearly spelled out in the Act or being on a single carrier basis* and results in an expansion of industrial strife and interruption to transportation—the most critical form of commerce.

A multi-employer bargaining unit under the Railway Labor Act is unlawful in the absence of union consent. The

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* Railway Labor Act, as amended 45 U.S.C. §152 (Ninth).

cases make it indisputably clear that consent is an essential prerequisite of multi-employer bargaining. The National Labor Relations Board, for example, has held, with the approval of two Courts of Appeal, that a multi-employer bargaining unit cannot be initially established without the consent of all parties and, moreover, that even where there is a long history of multi-employer bargaining, either the employer or the union may withdraw from the multi-employer bargaining for *any* reason, provided that withdrawal is timely and unequivocal. *The Evening News Ass'n*, 154 N.L.R.B. No. 121 (1965), enf'd., 372 F.2d 569 (6th Cir. 1967); *Hearst Consolidated Publications, Inc.*, 156 N.L.R.B. No. 16 (1965), enf'd, 364 F.2d 293 (2nd Cir. 1966); see also *Multi-Employer Bargaining and the National Labor Relations Act*, 66 Harv. L. Rev. 886, 889 (1953).

Moreover, analogous cases arising under the RLA (involving the obligation to submit disputes to so-called "national handling") indicate: (a) that one party has no absolute right to insist on multi-party bargaining by the other side, *Bhd. of R.R. Trainmen* v. *Atlantic Coast Line R.R. Co.*, 383 F.2d 225, 229 (D.C. Cir. 1967), even where that side (the union in the case just cited) has made identical demands on a number of employers, *id.*, and (b) there may be an obligation to bargain on a multi-party basis, but *only* where the issue on which such bargaining is sought is appropriate for multi-party bargaining *and* where there is a history of multi-party bargaining. *Bhd. of R.R. Trainmen* v. *Atlantic Coast Line R.R. Co., supra*, 383 F.2d at 229; *IAM* v *National Railway Labor Conference*, 310 F.Supp. 905, 911 (D.D.C. 1970). *Chicago, Burlington & Quincy R.R.* v. *Railway Employees Dep't, FFL-CIO*, 301 F.Supp. 603, 607

(D.C. Cir., 1969). In any event, consent (as manifested by past participation) is clearly a prerequisite to any such obligation.

There is no history of multi-employer bargaining with labor organizations representing cockpit personnel, and in particular with Allied Pilots, Association.

Multi-carrier bargaining does not exist in the airline industry although the effect of the Pact is to promote that result. Even under the National Labor Relations Act, multi-employer economic action is only permissible, for "defensive" purpose of "preserv[ing] the multi-employer bargaining basis from the disintegration threatened by the Union's strike action * * *" *NLRB* v. *Truck Drivers Local 449*, 77 S. Ct. 643, 648 (1957); *NLRB* v. *Brown*, 85 S. Ct. 980 (1965); *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 340 F.2d 690 (2nd Cir. 1965).*

The limitations on employer self-help should, if anything, be more stringently applied to carriers covered by the Railway Labor Act. This Court in *Brotherhood of Railway & Steamship Clerks* v. *Florida E. C. Railway Co.*, 86 S.Ct. 1420 (1966), made it plain that carriers under the Railway Labor Act are not relieved of all constraints on their actions because they are engaged in an economic struggle with their employees. In all instances, the public interest is paramount. Certainly in the instant case where the effect of the Pact will be to prolong *and broaden* the

* *Kennedy* v. *Long Island Railroad Co.*, 319 F.2d 366 (2nd Cir. 1963), aff'd, 211 F. Supp. 478 (S.D. N.Y. 1962), *cert. denied*, 84 S. Ct. 75 (1963), approving railroad strike insurance, to the extent it is contrary authority, is distinguishable as action taken in response to selective strikes in a context where multi-carrier bargaining had taken place. See *United Transportation Union* v. *Burlington Northern, Inc.*, 325 F. Supp. 1125 (D.D.C. 1971).

scope of the industrial conflict, the Board's action is directly counter to the purposes of the Railway Labor Act. Even if it could be argued that adding the strength of every carrier in a bargaining dispute otherwise affecting only one, will somehow enhance the prospects of industrial peace, that is not a decision within the competence or power of the CAB. Such a balancing of strength within the industrial relations context is a decision Congress has reserved to itself, lest that finely balanced apparatus which it has wrought with the aid of the parties themselves be turned into junk by technocrats with only a partial view.

POINT II

The CAB arbitrarily applied industry-wide considerations to the petitioner's single carrier status.

The Petitioner, Allied Pilots Association, is an independent Union representing only the pilots employed by American Airlines. APA does not belong to the AFL-CIO; it does not have an affiliation with any other Union; it does not have any agreement—express or implied—with any other Union for mutual support or coordination. Yet in any economic conflict American Airlines will receive the support of virtually the entire industry while APA will stand alone.

All of the arguments we have made with respect to the general impropriety of the Pact apply with even greater vigor to bargaining relationships which are concededly on a "one-to-one" basis. Brief for Petitioner at 13.

The Board wholly ignored APA's position as did the Court below when it was urged there. Because APA is not a giant, its right to independent survival cannot be so

trivially dismissed. Perhaps the reason why APA's position has not been treated lies in the fact that if the Board should acknowledge it, logic commands that the position must be accepted. The premise (faulty, we believe) for the Pact and the Board's approval of it rests on the asserted power of major unions with representation rights on more than one carrier. Presumptuously, the Board contends that this has been an evil overweening power which it must correct. However, if the Board is correct as a general proposition the Pact is consistent with the public interest, then the application of the Pact to APA *must be* inconsistent with the public interest; for the necessary effect of the Pact will be to discourage independent trade unionism and force such organizations as APA to seek, at least, greater coordination with other carrier trade unions. On the basis of the Board's own rationale the application of the Pact to APA is not consistent with the public interest* and is an arbitrary and capricious administrative act.

Conclusion

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

By: /s/ Martin C. Seham

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* The Board *must* disapprove such agreements, Federal Aviation Act of 1958, 49 U.S.C. §1382(b).

APPENDIX A

Decision of United States Court of Appeals (D. C. Cir., 1974)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1214

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

AMERICAN AIRLINES, INC., ET AL
ALLIED PILOTS ASSOCIATION & AIRCRAFT
MECHANICS FRATERNAL ASSOCIATION
FRONTIER AIRLINES, INC.
HUGHES AIR CORPORATION d/b/a HUGHES AIRWEST
NORTH CENTRAL AIRLINES, INC.
OZARK AIR LINES, INC.
PIEDMONT AVIATION, INC.
TEXAS INTERNATIONAL AIRLINES, INC.

No. 73-1229

AIR LINE DISPATCHERS' ASSOCIATION, ET AL,
PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

AMERICAN AIRLINES, INC.
BRANIFF AIRWAYS, INC.
CONTINENTAL AIRLINES, INC.
EASTERN AIR LINES, INC.
NATIONAL AIRLINES, INC.
NORTHWEST AIRLINES, INC.
UNITED AIR LINES, INC.
PAN AMERICAN WORLD AIRWAYS, INC.
TRANS WORLD AIRLINES, INC.
WESTERN AIR LINES, INC.
ALLIED PILOTS ASSOCIATION AND THE AIRCRAFT
MECHANICS FRATERNAL ASSOCIATION
FRONTIER AIRLINES, INC.
HUGHES AIR CORPORATION d/b/a HUGHES AIRWEST
NORTH CENTRAL AIRLINES, INC.
PIEDMONT AVIATION, INC.
TEXAS INTERNATIONAL AIRLINES, INC.

Petitions For Review of an Order of the
Civil Aeronautics Board

Decided August 8, 1974

Robert S. Savelson, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of

court, with whom *Donald J. Capuano* was on the brief, for petitioner in No. 73-1214. *Patrick C. O'Donoghue* and *Martin F. O'Donoghue, Jr.*, also entered appearances for petitioner in No. 73-1214.

William G. Mahoney, for petitioners in No. 73-1229.

Martin C. Seham, of the bar of the Supreme Court of the United States, *pro hac vice*, by special leave of court for intervenor, Allied Pilots Association and Aircraft Mechanics Benevolent Association. *Richard Hibey* and *James P. Davenport*, entered appearances for intervenors Allied Pilots Association and Aircraft Mechanics Benevolent Association.

Glen M. Bendixsen, Attorney, Civil Aeronautics Board for respondent. *Richard Littell*, General Counsel, Civil Aeronautics Board, *O. D. Czment*, Deputy General Counsel, *Robert L. Toomey*, Acting Associate General Counsel, Litigation and Research, Civil Aeronautics Board and *Robert B. Nicholson*, Attorney, Department of Justice, were on the brief, for respondent. *R. Tenny Johnson*, General Counsel, Civil Aeronautics Board, at the time the record was filed and *Warren L. Sharfman*, Associate General Counsel, Civil Aeronautics Board, at the time the record was filed, also entered appearances for respondent. *Howard E. Shapiro*, Attorney, Department of Justice also entered an appearance for respondent.

Charles A. Miller with whom *Robert N. Saylor* and *Eugene D. Gulland* were on the brief, for intervenors trunkline carriers.

Raymond J. Rasenberger and *James L. Devall* were on the brief for intervenors, Frontier Airlines, Inc., et al.

Before: BAZELON, *Chief Judge* and MACKINNON, *Circuit Judge* and CHRISTENSEN,* *United States Senior District Judge* for the District of Utah

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion for the Court filed by *Chief Judge* BAZELON.

BAZELON, *Chief Judge*: Petitioners, who are various groups of airline employees, challenge the CAB's approval of the airlines' Mutual Aid Pact, as amended. They contend that the Pact, as approved, violates the national labor policy, the Railway Labor Act (RLA) and the antitrust laws; and that there is no substantial evidence to support the CAB's finding that the Pact is not adverse to the public interest.

I.

Created in 1958 by six airlines, the Mutual Aid Pact represented a joint effort to soften the impact of strikes against individual companies. At its inception, the Pact provided only for "windfall payments." A strikebound company received payments from other Pact members equal to their increase in revenues resulting from the strike minus their added operating expenses in servicing the new business. The Pact was soon amended to provide for "supplemental payments." This feature enabled a carrier member to receive 25% of its normal air transport operating expenses for operations shut down by the strike. A 1969 amendment to the Pact raised that figure to 50% during the first fourteen days of the strike, dropping by stages to 35% after a strike period of four weeks or longer. The additional payments over windfall to meet this allotment were to be contributed by each member in the proportion which its air transport operating revenues bore to the total revenue for all members. Individual carrier liability for supplemental payments was limited at first to one-half of one percent of the carrier's intake for the prior year. That limitation was upped in 1969 to one percent by agreement of the Pact members.

Both the increase in supplemental payments rates and the higher ceiling on individual carrier liability were

approved in the Board's 1973 order,[1] which followed an initial decision by the Administrative Law Judge refusing to allow the escalations.[2] These elements of the amended Pact are the primary focus of the unions' attack on the Board's action. Petitioners also contest the CAB's consent to a 1971 amendment to the Pact authorizing the participation of local service carriers.

II.

The Supreme Court has recognized the responsibility of transportation agencies like the CAB to make decisions consistent with national labor policy. *Burlington Truck Lines v. United States*, 371 U.S. 156, 173. This responsibility was explicitly recognized in the Board's opinion and is not a matter of dispute on appeal. What is in dispute is the substance of national labor policy relevant to this case.

The national labor policy rests on the principle that parties should be free to marshall the economic resources at their disposal in the resolution of a labor dispute, consistent with the specific rights and prohibitions established by the labor statutes. It is not generally given to government agencies to "regulate what economic weapons a party might summon to its aid."[3] And this principle, of course, underlies the RLA, which is made applicable to air carriers by 45 U.S.C. § 181 and by section 401(k)(4) of the Federal Aviation Act, 49 U.S.C. § 1371(k)(4). That Act does establish certain procedures that must be followed in the direct bargaining

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[1] CAB Order 73-2-110, Feb. 27, 1973, Joint App. 268a.

[2] Initial Decision of Examiner Arthur S. Present, Joint App. 271a.

[3] NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 490 (1960).

process,[4] but once these procedures are exhausted without a settlement, either side is free to resort to economic self-help in an attempt to force a settlement most favorable to it.[5]

This is not to suggest that warfare between unions and the airlines may rage uninhibited under the RLA. Like other substantive labor legislation, the RLA imposes a duty on both employers and employees to bargain in good faith,[6] and it recognizes the right of employers to organize without employer interference.[7] But in this case the CAB specifically noted that "the record is replete with evidence of the earnest and consistent good faith efforts of [the Mutual Aid Pact Members] to find a resolution to their strikes throughout the course of difficult labor negotiations."[8] The Board also points to evidence refuting any notion that the Pact functions as an employer device to control the formation of bargaining units.[9]

The permissibility of the Mutual Aid Pact under the RLA is supported by *Kennedy v. Long Island R.R.*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963). The case involved a union attack on a strike insurance plan in the railroad industry, a device whose similarity to the Mutual Aid Pact in the airlines industry was

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[4] *See* 45 U.S.C. §§ 154-63, 183-85.

[5] *See* Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378-79.

[6] 45 U.S.C. § 152 First.

[7] *Id.* § 152 Fourth.

[8] Opinion of the CAB, Feb. 27, 1973, Joint App. 240a-41a. One instance of an alleged RLA violation by an airline is noted, but it was not shown to have any connection to carrier membership in the Pact. *Id.*, Joint App. 241a.

[9] *See id.*, Joint App. 240a n.14.

specifically noted in the Second Circuit's opinion. In upholding the plan, the court began with the principle set out above and found further support for its result in section 20 of the Clayton Act [10] and section 4 of the Norris-La Guardia Act,[11] which sanction the payment of benefits to parties engaged in a labor dispute. Petitioners' efforts to undermine the rationale of the *Kennedy* decision are unconvincing.[12] We find the Board's approval of the Pact, as amended, fully consistent with the national labor policy and the RLA.

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[10] 29 U.S.C. § 52.

[11] 29 U.S.C. § 104.

[12] Petitioners' argument is based in part on a later holding of the Second Circuit, NLRB v. A. & P. Stores Inc., 340 F.2d 690, that a lockout by employers who were not in the same bargaining unit as the company being struck was violative of the National Labor Relations Act. Petitioners urge that this case implies that multiemployer aid is impermissible except in the context of multiemployer bargaining units, which presently do not exist in the airlines industry. *A. & P.* is easily distinguished from *Kennedy* in that the court's result in *A. & P.* turned on a finding that the lockout violated section 8(a) (1) of the NLRA as a device to force the unions to accept multiemployer bargaining units. As we have noted, text accompanying note 9 *supra*, the Pact does not appear to have such coercive tendencies.

The unions also resort to *Brotherhood of Railway & Steamship Clerks v. Florida East Coast R. Y.*, 384 U.S. 238 (1966), which held that during a strike period a railroad could make some alterations in its contracts with the unions without submitting these alterations to the lengthy negotiations procedures required by the Act. The unions attempt to read into this case a principle limiting the use of employer self-help whose effect is to prolong strikes. In fact, the decision vindicates the right of self-help in the face of the technical requirements of the Act by allowing the employer to make adjustments necessary for continued operations during the strike subject only to approval by the district court.

III.

There is no indication either in the initial opinion of the Administrative Law Judge or in the CAB's opinion that the unions presented their antitrust objections to the Pact in the proceedings before the agency. As a technical matter, therefore, we are precluded from considering the antitrust attack absent any reasonable grounds for failure to pursue that attack before the CAB.[13] As a practical matter, we cannot exercise an appellate function in the review of administrative matters unless the problems have been fully aired and focused in the proceedings below. The Federal Aviation Act (FAA) specifically exempts agreements approved by the CAB from the operation of the antitrust laws.[14] The initial forum in which to raise antitrust objections remains the agency which is charged with the primary determination of the public interest.[15]

IV.

In passing on agreements among air carriers under 49 U.S.C. § 1382, the CAB is required to disapprove any

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[13] 49 U.S.C. § 1486(e) provides:

> No objection to an order of the Board . . . shall be considered by the court unless such objection shall have been urged before the Board . . . or if it was not so urged, unless there were reasonable grounds for failure to do so.

[14] 49 U.S.C. § 1384.

[15] In prior rulings, the CAB has dealt with antitrust objections to the Pact. *See, e.g.*, Opinion of the CAB, July 10, 1964, Joint App. 44a, 66a-67a. It concluded that the Pact "has not operated in restraint of trade or lessened competition between air carriers . . . ." However, we do not consider these prior rulings, or the findings which they contain, to be proper subjects of review at this juncture. *See* 49 U.S.C. § 1486(a) (precluding appeals from orders of the CAB after 60 days of decision except by leave of court on a showing of reasonable grounds for failure to file in timely fashion).

agreements which it finds to be "adverse to the public interest." The courts may not overturn the CAB's findings of fact unless they are unsupported by substantial evidence on the record.[16] Nor may they upset the final judgments of the CAB unless they fall outside a zone of reasonableness.[17] It is urged, however, that because the CAB lacks expertise in labor matters, its decisions impinging on the activities of unions in the airlines industry are to be accorded less weight than these standards imply, although petitioners fail even to articulate an alternative standard.[18]

The CAB is not a labor board, of course, as it is first to concede.[19] Yet we have already concluded that its decision in this case is consistent with national labor policy, such as it may be discerned. Beyond that, a proper evaluation of the Pact's effect on the unions and their members necessarily involves a firm grasp of industry practices under the agreement, and the CAB's grasp has reason to be firm. Against a background knowledge of the industry's economic structure, the CAB has monitored the Pact since its inception sixteen years ago and has the benefit of three full evidentiary hearings conducted on the Pact in 1962, 1966 and 1970.[20]

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[16] 49 U.S.C. § 1486(e): "The findings of fact by the Board . . . , if supported by substantial evidence, shall be conclusive."

[17] *See, e.g.*, American Airlines, Inc. v. CAB, 98 U.S. App. D.C. 348, 354, 235 F.2d 845, 851 (1956).

[18] Brief for Petitioner Air Line Pilots Ass'n, Int'l at 8-9.

[19] Brief for Respondent CAB at 16.

[20] *Cf.* National Aviation Trades Ass'n v. CAB, 136 U.S. App. D.C. 367, 372, 420 F.2d 209, 214 (1969) (endorsing CAB's competence to make findings relevant to antitrust factors despite its lack of expertise as such in the antitrust field).

Despite the CAB's experience with the Pact, we would not affirm, of course, if issues of employee welfare had been ignored or slighted. This court has previously pointed out "the Board's duty to consider the welfare of carrier employees under the public interest standard when it approves agreements under Section 412."[21] But in a finding that the unions do not dispute, the Board in this case declared

> that the employees retain substantial and effective bargaining power regardless of the Mutual Aid Agreement. Thus, the record shows that air carrier wages . . . are higher than, and . . . have increased faster than, wages in other industries, including other transportation industries.[22]

We do not think the Board need have gone further in this respect.

In assessing the net impact of the Pact and its new amendments, the CAB also took into account, *inter alia*: the industry's vulnerability to strikes; the tendency of the Pact, as amended, to promote or prolong strikes; and the impact which the agreement has on the viability of marginal companies. Since the basis of the CAB's findings on each of these points is vigorously attacked by the unions, we will review in some detail the evidence on which the Board bases its findings.

The Board found that the air transport industry "suffers a greater impact by strike than do other industries, and is therefore more vulnerable to strike[s] . . . than are other industries." The unions claim that this finding is based on a misreading of the testimony of Dr. Herbert R. Northrup of the Wharton School of the University

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[21] Air Line Pilots Ass'n, Int'l v. CAB, 154 U.S. App. D.C. 316, 321, 475 F.2d 900, 905 (1973).

[22] Opinion of the CAB, Feb. 27, 1973, Joint App. 234a-35a.

of Pennsylvania.[23] On our reading of the statement, Dr. Northrup seems quite explicit that airlines—like other service industries in which the ability to stockpile is limited—are particularly vulnerable to strikes and furthermore that they are more vulnerable to strikes than other transportation industries with a higher percentage of freight traffic, which can be stored pending settlement.[24] In defending the peculiar suitability of the Mutual Aid Pact for the airlines industry, the Board did not purport to find that air carriers were more sensitive to work stoppages than *all* other transport industries; nor was such a finding necessary.

The two remaining findings of the Board which come under special fire are: (1) that the Pact, as amended, is not likely to have a serious impact on the willingness of companies to sustain or prolong strikes; (2) that the payments required by the Act do not and are not likely to affect the viability of small or economically marginal airlines. These findings are defensive in nature. They are central to the Board's answer to allegations that the Pact poses risks to the stability and smooth operation of the airlines system which outweigh the benefits on which we have touched. If either finding were unsupported, we would have difficulty in countenancing the Board's decision. But we do not so conclude.

Although the CAB followed the Administrative Law Judge's view that "the record does not establish that any carrier has incurred or prolonged a strike because of the increased level of mutual aid," [25] it differed from his assessment of a substantial danger that the amended

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[23] Trunkline Carrier Exhibit No. 80.

[24] *Id.* 11-12.

[25] Initial Decision of Examiner Arthur S. Present, Joint App. 301a.

Pact *would result* in significantly longer and more frequent work stoppages. In concluding that this risk was not substantial, the Board noted the relative infrequency with which negotiations in the airlines industry have erupted into strikes in recent years. The statistics cited cover the period from 1968-1971, during at least part of which the new amendments were actually in effect.[26]

The CAB's finding on the prolongation issue is further supported by the Board's determination that significant financial pressures to settle remain on the airlines despite their participation in the Pact. The unions point out that in 1970 some airlines actually experienced operating profits during periods of strike when supplemental payments under the Pact were taken into account. But the Board reasonably believed that in assessing the dynamics of the companies' position during strikes, operating profits should be compared to "normal profits" for a similar period—profits which the company would have enjoyed if it had not sustained a strike. Similarly, it included in its model "post-strike losses." These take in the cost of resuming operations, losses attributable to the absence of advance bookings and "the long-term loss of traffic attributable to the loss of carrier identity in the market . . . ." [27]

Clearly "normal profits" and "post-strike losses" are based to some degree, as petitioners assert, on "speculation and hypothecation," [28] but the absence of certainty does not preclude the Board from making a considered

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[26] Ironically, the unions cite the same statistics in their attempts to refute the CAB's findings on the strike prolongation issue. Brief of Petitioner Air Line Dispatchers' Ass'n at 40. This would seem to ignore that the Pact was in effect during the entire period covered by the figures.

[27] Opinion of the CAB, Feb. 27, 1973, Joint App. 236a.

[28] Brief of Petitioner Air Line Dispatchers' Ass'n at 30.

judgment on the best information available. One could wish that the Board had addressed itself to the methodological problems inherent in estimating these loss factors: it simply stated that it considered the companies' figures to have been "reasonably estimated" and adopted them as its own.[29] Yet the unions do not point to evidence that the companies reached their estimates by misguided or meritricious methods. And the CAB did seek to control the risk of error by limiting its approval of the agreement to a period of five years. Thus, if the CAB's "hypothecations" prove wrong, they may be corrected.

The Board also found that the Pact offers no significant threat to the financial stability of its members. Although the Administrative Law Judge reached a different assessment of the risk involved, he believed the record did not "demonstrate that the viability of any carrier has been critically threatened because of the higher level of contributions required under the amended agreement."[30] The CAB reinforced its own evaluation by reference to the amounts paid out by various airlines as compared with strike losses incurred.[31] These statistics cover the period from January 1970 to June 30, 1971, when the new higher ceilings were in effect. The Board concluded, not unreasonably, that the payments are not out of proportion to the gains from the protection offered. The balance of costs and benefits in favor of allowing the agreement was found to be particularly true for financially weak carriers, which stand to lose most

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[29] These methodological problems do receive extensive treatment by company experts on the record. *See* Trunkline Carrier Exhibit Nos. 50-52. Presumably these discussions provided the basis of the CAB's acceptance of the estimates.

[30] Initial Decision of Examiner Arthur S. Present, Joint App. 301a.

[31] Opinion of the CAB, Feb. 27, 1973, Joint App. 243a-44a.

from strikes or threats of strike.[32] This line of justification also supports the Board's approval of the 1971 amendment allowing local service carriers to join the Pact, for these carriers, as a group, are likely to be less stable, and therefore more vulnerable to strikes than trunkline carriers.

Of course, the ceiling imposed by the Pact provides some safeguard against oppressive payments. And although liability for windfall payments may bring a carrier's total obligation to more than one percent of its operating revenues, the Board argues correctly that the windfall payments represent no added burden to the company which must pay them, because they represent only profits which the company could not have expected to enjoy absent the strike suffered by its competitor.

We conclude that the findings on which the Board rests its decision are adequately supported and that the result reached is a reasonable one.

V.

We have carefully considered the unions' remaining contentions.[33] We believe that only one warrants discussion. The unions say the CAB erred in failing to adopt a condition that would have precluded consideration of amounts paid out under the Pact as expenses for the purpose of establishing rates. As the CAB recognized,[34] the petitioners are seeking to pursue this issue in the wrong procedural context. The authority of the Board to review and prescribe air carrier rates is ex-

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[32] *Id.*, Joint App. 245a.

[33] These include a claim of bias on the part of CAB, which we deem without substantial foundation.

[34] The CAB refused to take evidence on this point. Brief of Petitioner Air Line Pilots Ass'n, Int'l at 72.

ercised in distinct proceedings under the FAA.[35] If the unions feel that the rates charged by the airlines are unreasonable because they include allowances for payments under the Pact, they may institute proceedings before the CAB under 42 U.S.C. § 1482(d). Petitioners suggest that their objection would be "buried" in a rate-making proceeding.[36] If this should happen, and if the unions are so advised, they may seek judicial review.[37]

Affirmed.

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[35] 49 U.S.C. § 1482(d).

[36] *See* Brief of Petitioner Air Line Pilots Ass'n, Int'l at 72.

[37] *See* 49 U.S.C. § 1486(a).

APPENDIX B

Airlines Mutual Aid Pact
Order 70-7-114 (July 23, 1970)

Opinion of the Board

Opinion of Chairman Browne, Concurring

Opinion of Members Minetti and Murphy, Dissenting

Initial Decision of Examiner Arthur S. Present (1969)

ALAN OSTER for Allied Pilots Association.

HERBERT A. ROSENTHAL and ALEXANDER N. ARGERAKIS for the Bureau of Operating Rights, Civil Aeronautics Board.

Opinion

BY THE BOARD:

Once again the Mutual Air Agreement, providing for inter-carrier financial assistance in certain types of strikes, is before the Board. The original Agreement was approved, effective for one year, in 1959,[1] and an amended Agreement was approved in 1964 for a period of three years.[2] Seven carriers then parties to the Agreement applied for renewal of the amended Agreement, and the matter was assigned for hearing before Examiner Arthur S. Present. In his initial decision of March 7, 1969, the examiner found that the Agreement is not adverse to the public interest or in violation of the Act and should be approved for an indefinite period subject to conditions. We granted review, and briefs and oral argument have been received on behalf of the Carrier Parties,[3] the Six Union Parties,[4] and the Air Line

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[1] Six-Carrier Mutual Aid Pact, 29 C.A.B. 168, reconsideration denied, 30 C.A.B. 90 (1959).

[2] Mutual Aid Pact Investigation, 40 C.A.B. 559 (1964).

[3] The seven carrier parties to the proceeding are American Airlines, Braniff Airways, Eastern Air Lines, Northwest Airlines, Pan American World Airways, Trans World Airlines, and United Air Lines. Pursuant to amendments to the Agreement adopted as of October 31, 1969, Continental Air Lines, National Airlines, and Western Air Lines have joined.

[4] The Air Line Dispatchers Association, the Brotherhood of Railway and Steamship Clerks, the Communication Workers of America, the Flight Engineers International Association of Machinists and Aerospace Workers, and the Transport Workers Union of America.

Pilots Association, International (ALPA). In addition Mohawk Airlines and North Central Airlines filed a joint brief as *amici curiae* and participated in oral argument.

In addition to review of the initial decision, there are two developments occurring since its issuance which must be considered here. First are amendments to the Agreement entered into as of October 31, 1969. Second is the request of Mohawk and North Central that the Board withhold approval of the Agreement until appropriate steps are taken to assure the participation of these carriers and any other local service carrier in the Agreement at issue or a comparable one with terms at least as favorable and with participation by the same trunkline carriers.

Upon consideration we find that the Agreement, both in the form passed on by the examiner and as amended on October 31, 1969, should be approved for an indefinite period subject to the conditions imposed by the examiner and that the request of Mohawk and Lake [*sic*] Central should be denied.

The Agreement considered by the examiner is summarized in the initial decision at page 2 and is set forth in full in Appendix A to the initial decision. Its terms were also discussed in detail in the Board's prior decision.[5] The Agreement, in brief, provides that if a specified type of strike occurs, non-struck carriers shall pay a struck carrier or carriers "windfall" payments, the increased revenues attributable to the strike, plus "supplemental" payments, if the windfall payments do not equal 25 percent of the struck carrier's normal operating expenses. While we shall, subsequently, compare terms of this Agreement affected by recent amendments, no further discussion of its provisions appears warranted.

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[5] 40 C.A.B. at 573-577, 599-600.

Opinion

As indicated above, the examiner concluded that the Agreement is not adverse to the public interest or in violation of the Act and should be approved for an indefinite period subject to conditions. His principal findings underlying this conclusion are that the Agreement is fully consistent with national labor policy; that developments since the prior proceeding further support the contribution of the Agreement to airline stability; that the evidence establishes that the Agreement has had little, if any, impact on labor-management relations; and that the evidence does not show that the pact has had any material effect upon the collective bargaining process.

We have carefully considered the contentions of the parties in the light of the record and find that we are in agreement with the examiner's decision, except as to the relatively minor aspects noted below. Accordingly, except to the extent modified herein, we adopt as our own the findings and conclusions of the examiner as contained in the initial decision attached hereto as an Appendix.

The contentions of the Six Union Parties and ALPA in opposition to the Agreement addressed to the Board are substantially the same as those raised with the examiner. His treatment of these contentions is comprehensive and thorough, and we shall consider here only (1) those contentions involving the Agreement approved by the examiner which we feel justify further discussion, (2) issues relating to the October 31, 1969 amendments, and (3) the question of exclusion of local service carriers.

Opinion

I.

As before, an attempt is made to demonstrate by statistics that the Agreement has contributed to industrial strife and strikes. Referring to Carrier Exhibit 20, the Six Union Parties point to the fact that during 110 months prior to the Agreement there were 40 strikes and that during an equivalent period under the Agreement there were 42,[6] an incident increase of 5 percent. Further, they calculate that there were 514 strike days lost during 110 months prior to the Pact and 612 for an equivalent period under the Pact, an increase of 17 percent. The Six Union Parties are also critical of the examiner's comparison of strikes against parties to the Agreement as against strikes against nonparticipating carriers. They assert that the comparison is arbitrary and unexplained and that the statement that such a comparison discloses no important difference in the number of strikes or duration thereof is erroneous on the basis of the data employed and is supported only by a juggling of the data.

As the Board has previously held, "the bare fact that there may have been a deterioration in labor-management relations during the period of operation of the Pact covered by the record does not raise a presumption that the deterioration was caused by the Pact and such fact, standing alone, does not make out a 'prima facie case' that the Pact violates the public interest."[7] In our view the figures relied upon by the Six Union Parties do not make out such a prima facie case. There is no such marked upsurge in the incidence or length of strikes as to lead to any allowable inference that the Agreement is responsible for either.

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[6] Omitted are strikes against BOAC and Quantas [*sic*].

[7] 40 C.A.B. at 562-563.

This is particularly the case in the context of the entire record which does not show that the Agreement has had any material effect upon the collective bargaining process. Moreover, the comparisons made by both the Six Union Parties and the examiner to reach opposite results rely on unweighted data[8] which, in our judgment, are of insufficient probative value to reliably indicate either that the Agreement has or has not contributed to industry strife and strikes so as to adversely affect the public interest.[9] Finally, even if we were to indulge in the assumption that the increases in the number and length of strikes were caused by the mutual aid pact, these increases have not been of such magnitude as to have resulted in a qualitative adverse change in labor relations, offsetting the contributions to that stability which the Agreement brings.

The Six Union Parties characterize as a "myth" the examiner's conclusion that the airlines involved need the financial stability provided by the mutual aid agreement. They argue that in 10 years Pact members incurred a total strike loss of 246 million dollars of which 82 million was made up of Pact payments, leaving a final loss of 164 million dollars. Of this, some 116 million dollars, or 70 percent, was lost in the 1966 IAM strike. "Yet," they state, "it is clear in terms of the financial stability

[8] As to duration of strikes, the data do not distinguish among strikes against trunk carriers, all-cargo carriers, local service carriers, helicopter carriers, or foreign air carriers, although the Six Union Parties do exclude the latter from their figures. As to incidence, each strike is given equal weight regardless of the duration of the strike or the type of carrier struck.

[9] Accordingly, we do not adopt the examiner's statement, on the basis of the data, that the Agreement has not led to increased labor strife or the statistical comparisons employed by him in this connection. (I.D. 24-25).

of the airlines involved that they would have been much better off to have met the original IAM demands without quibbling than to follow the course they did." But the argument assumes an unsubstantiated predicate—that if there had been no Pact, there would have been no strike. We find, as did the examiner,[10] that the record does not support the claim that the availability of mutual aid was the determinative factor in inducing the carriers to take the 1966 strike.[11]

ALPA argues, among other things, that the Pact as applied to it is inconsistent with the national labor policy[12] and violates the Railway Labor Act. The examiner rejected the argument,[13] we believe correctly, but additional discussion is appropriate because ALPA has cited to us cases not cited to the examiner.

ALPA asserts that, contrary to the initial decision, court decisions in cases involving multi-employer economic activity against employees have limited its permissible scope to action which is (1) confined to a multi-employer

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[10] I.D. 35.

[11] It may be noted also that we do not read the initial decision (I.D. 35-37), as do the Six Union Parties, as criticizing union refusal to accept the 3.2 percent offer. In any event, we neither criticize nor endorse this refusal.

[12] The examiner concluded that the Board must heed the national labor policy, and it must accomodate the objectives of the Act to the purposes of the national labor policy (See I.D. 10-13). The Six Union Parties contend that the examiner erred in considering national labor policy, citing certain dicta in the 1959 decision (29 C.A.B. at 173). While there is language in the first Board opinion that matters of general policy as to labor disputes are not to be considered as a public interest factor, it is clear from the opinion on reconsideration as well as the 1960 decision that the Board has always regarded as a relevant consideration whether the Agreement is consistent with national labor policy (See 30 C.A.B. at 92; 40 C.A.B. at 562, 609-610).

[13] I.D. 14-17.

bargaining unit, and (2) only for purposes of protecting the multi-employer bargaining unit in the face of union activity directed at its common front or integrity. The reach of the decisions cited by ALPA is far from sustaining its position that, since the airline industry does not bargain as a unit with ALPA, any multi-employer economic action—and specifically mutual aid—is unlawful as applied to it.

Three decisions cited by ALPA hold that a lockout by all members of a multi-employer bargaining group in response to strike against one member is lawful.[14] But none of these cases hold that multi-employer economic action is lawful only for purposes described by ALPA, nor do they even discuss the question. In *NLRB* v. *Great Atlantic & Pacific Tea Co.*,[15] the Court of Appeals for the Second Circuit, in an opinion by Judge Kaufman, held that a lockout by an employer group violated the National Labor Relations Act. Since the employees had not committed themselves to industrywide bargaining, it was found the employers' conduct lost the protective quality which would otherwise justify the lockout[16] and instead assumed the character of an offensive weapon which would unfairly advantage the employers in their demands for a multi-employer unit.

It is a very long step—and one we are not prepared to take—to conclude that because the lockout in the *A&P* case violated section 8(a)(3) and (7) of the National

[14] NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87 (1957); NLRB v. Brown, 380 U.S. 278 (1965); International Ass'n of M. & A. W. v. National Ry. Labor Conf., 310 F. Supp. 905 (D.C.D.C., 1970).

[15] 340 F. 2d 690 (C.A. 2, 1965).

[16] See NLRB v. Truck Drivers Local Union No. 449, *supra*.

Labor Relations Act,[17] the Mutual Aid Agreement violates the Railway Labor Act.[18] There is no evidence whatsoever that the Agreement in any way infringes on the right of employees to organize and bargain collectively through representatives of their own choosing under Section 2, Fourth; or requires any person seeking employment to sign a contract or agreement prohibited by Section 2, Fifth; or obstructs carrier-employee agreements sanctioned by Section 2, Eleventh. Nor are there any facts or circumstances set forth by ALPA from which a *per se* violation may be inferred.[19] Moreover, we do not, as does ALPA, construe Judge Kaufman's opinion in the *A&P* case as qualifying in any degree his opinion in *Kennedy* v. *Long Island Railroad Company*[20] upholding the legality of the railroads' strike insurance plan. Accordingly, we find that ALPA's arguments are without merit.

For the foregoing reasons and those set forth in the initial decision, as modified herein, we conclude that the Agreement which was the subject of the renewal proceeding should be approved. We next consider the Agreement as subsequently amended.

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[17] These sections provide, respectively, that it shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of the rights of employees as to organization, collective bargaining, etc. and (2) by discrimination in regard to hire or tenure of employment or any terms or condition of employment to encourage or discourage membership.

[18] The only sections of the R.L.A. cited by ALPA in this connection are Sections 2, Fourth, Fifth and Eleventh, covering rights similar to those referred to in the previous footnote.

[19] See *Kennedy* v. *Long Island Rail Road Company*, *infra*.

[20] 319 F. 2d 366 (C.A. 2, 1963), *cert. den.* 375 U.S. 830 (1963).

II.

By letter of October 31, 1969, filed in this docket, the Carrier Parties advised the Board that as of that date they had agreed to several amendments to the Agreement. Previously, they noted, in the event of strikes covered by the Agreement, the other struck members paid their net windfall revenues to the struck carrier or carriers and, in addition, made supplemental payments to the extent necessary so that the receipts of the struck carrier or carriers would equal 25 percent of normal operating expenses for the operations shut down by the strike. The amendments increase the level of supplemental payments to 50 percent of the struck carrier's normal operating expenses during the first two weeks of the strike, 45 percent for the third week, 40 percent for the fourth week, and 35 percent for any period thereafter. The amendments also increase the annual maximum liability of any carrier for supplemental payments from one-half percent to one percent of its air transport operating revenue for the previous calendar year.[21]

Other principal features of the amendments to the Agreement include:

(1) Alteration of the conditions of entry to permit any trunk carrier to join the Agreement by November 15, 1969, without a waiting period or back payment.

(2) Modification of the conditions of withdrawal to provide that withdrawal may take effect at the end of

[21] Except that the parties may agree at any time in writing that the liability for additional payments in a particular calendar year shall be subject to a higher percentage limitation, in which event any carrier that thereafter joins the Agreement shall be subject to such Agreement to increase liability in the calendar year in which its adherence becomes effective.

any calendar year beginning December 31, 1972, provided that one-year's notice of withdrawal be given.

(3) Modification of the arbitration clause to provide that disputes concerning the amount of any payment shall be subject to arbitration. Previously, only disputes over the requirement to make or the right to receive payment were subject to arbitration.

On December 2, 1969, the Agreement, in substantially the same form as attached to the letter, was formally filed under section 412 of the Act (C.A.B. 21445). In their brief, the Carrier Parties state that pursuant to the foregoing amendments, Continental, National, and Western have joined the Agreement, the latter's adherence becoming effective August 3, 1970.

In response to the carriers' notice of amending the Agreement, the Allied Pilots Association renewed their request that the Agreement not be approved with respect to American Airlines. A request of the Six Union Parties, supported by ALPA, to remand this proceeding for further evidentiary hearings on the amended agreement was deferred.[22]

We have decided to pass on the amended Agreement at this time without remand. Lengthy proceedings have been had on two earlier versions of the Agreement, and there has been thorough exploration of the basic issues affecting the public interest in each proceeding. Moreover, it has not been demonstrated why a further hearing is necessary or what new facts would be brought out on remand. We, therefore, do not believe that the public interest, or the proper dispatch of the Board's work, would be served by further hearings on the latest version. We have before

[22] Order 70-1-100.

us, we believe, sufficient facts on which to predicate a judgment as to whether the amended Agreement is adverse to the public interest or in violation of the Act. We conclude that the amended Agreement should be approved.

The Carrier Parties assert that several factors necessitated the increase in the protection provided by the recent amendments. Briefly, it is asserted that: (1) strike losses have continued to mount; (2) the financial ability of airlines to withstand strikes has significantly deteriorated; (3) the prior level of supplemental payments was insufficient to enable the carriers to resist excessive and highly inflationary union demands; (4) the effectiveness of Mutual Aid is directly related to the number of trunklines participating in it: membership of all principal competitors of a struck carrier greatly strengthens the "windfall" provisions, and the availability of protection to virtually all trunklines adds significantly to the industry's ability to resist excessive demands. In their brief, the Six Union Parties contend that the carriers' arguments are nothing more than a claim that failure justifies more extended efforts, and the carriers appear to have become "boxed in" by their own past failures and the inability to back up and take a good look at the situation and find some other course. Further approval, they assert, "will simply be one more step on the road to escalation of industrial warfare, one more step into the mess from which the air carriers and the Board will find it increasingly difficult to extricate the industry, and one more step on the road to disaster."

This baleful prophecy is accompanied by no facts. There is no record support for the supposition that the Agreement considered by the examiner resulted in an "escalation of industrial warfare," and there is no reason to believe that the amended Agreement will have any such result.

Opinion

While the recent amendments strengthen the Agreement, they do not change its basic nature or add any new element which suggests that it, unlike its predecessors, is adverse to the public interest. Thus, in light of the record compiled with respect to the previous Agreement, we are unable to conclude that the amended Agreement will induce strikes or exacerbate labor-management relations or create an imbalance in the collective bargaining process so as to pose a threat to the attainment of the public interest objectives of the Act.[23] Further, as in the case of the prior Agreements submitted to the Board and for the reasons previously assigned, we find that the amended Agreement is consistent with national labor policy and violates neither the Federal Aviation Act nor the Railway Labor Act.

As to the positive contribution of the amendment Agreement to airline stability, we have had occasion recently to take note of the accelerated cost pressures on the carriers and the marked decline in their earnings and profit margins.[24] In its 1964 opinion the Board stated: "The Part offers, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, in this fashion and to this extent contributing to industry stability."[25] The cost of protection is still not unreasonable,[26] in light of their deteriorated financial position the need for protection is greater, and the cost of

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[23] See 29 C.A.B. at 173-174.

[24] Order 69-9-68, September 12, 1969.

[25] 40 C.A.B. at 561.

[26] The liability of any carrier for supplemental payments is limited to one percent of its air transport revenues for the previous calendar year.

strikes has increased sharply.[27] What was said concerning the contribution of the prior Agreement to air carrier stability applies with greater force today. We recognize that the new Agreement will provide substantially greater recoupment of strike losses, particularly in the case of short strikes when maximum benefits will be provided.[28] However, for the reasons set forth above, we do not believe that this factor overrides the favorable aspects of the Agreement. Furthermore, it hardly seems reasonable to believe that a carrier will risk a strike on speculation that the strike will be short and that the carrier will realize the maximum benefits. Carriers must, under the new Agreement, as under the old, face the prospect that in all probability mutual aid will not meet their strike losses. Finally, the possibility of permanent diversion of traffic to competing carriers will serve as a positive incentive for carriers to avoid strikes.

For the foregoing reasons we shall approve the amended Agreement, subject to terms imposed with respect to the prior Agreement and for an indefinite period for the reason given by the examiner in his decision on the prior Agreement.[29]

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[27] During the period 1961-1966, carriers struck two or more times have experienced the following strike losses per day: Eastern: 1961—$466,000; 1962—$300,000; 1966—$606,000; Pan American: 1961—$523,000; 1964—$356,000; 1965—$585,000; TWA: 1961—$386,000; 1966—$1,363,000; United: 1963—$336,000; 1966—$1,422,000. (Carrier Exh. 32).

[28] As noted previously, a struck carrier receives 50 percent of normal operating expenses for the first two weeks, with a 5-percent tapering off in each successive week until a 35-percent level is reached.

[29] The signatories to the Agreement are cautioned that our approval does not extend to any agreement entered into pursuant to Paragraph 1(B)(2) raising a party's liability for supplemental payments in any calendar year beyond one percent of a party's air transport revenues for such prior calendar year.

III.

We turn finally to the request of Mohawk and North Central that the Board withhold approval of the new Agreement until appropriate steps are taken to assure the participation of local service carriers in the Agreement or in a comparable one with terms at least as favorable and with participation by the same trunkline carriers. The Six Union Parties and ALPA oppose the participation of local service carriers. The Carrier Parties urge that the Board approve the Agreement, and they state that after this is done, the trunk carriers are prepared to turn to the question of local service participation.

The request of Mohawk and North Central will be denied. The exclusionary provision in the new Agreement is the same as that in the Agreement considered in the renewal proceeding. Yet the two carriers did not seek to intervene until nine months after the initial decision issued. We denied this request for intervention on the ground that the petition was untimely and that grant of intervention at that stage would not be conducive to the orderly conduct of the proceeding.[30] While the carriers were permitted to file a statement in the nature of an *amicus curiae* brief, it was to be limited to the question of whether the Board should approve that portion of the Agreement which limits participation in the Agreement to trunkline carriers. The relief requested, however, appears to go beyond this issue, and to withhold approval of the Agreement, as they ask, would be no more conducive to the orderly conduct of the proceeding than would their intervention have been.

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[30] Order 70-1-100.

Moreover, on the issue on which Mohawk and North Central have been permitted to be heard, they have not shown that the exclusionary provisions of the Agreement are anti-competitive in their purpose or effect, or that they or local service carriers generally have been prejudiced by it. On the very scant record before us on the question we are not prepared to find that the provision is adverse to the public interest.

We are also mindful of the fact that Mohawk and North Central speak only for themselves and not for local service carriers generally and that the trunk carrier parties do not oppose in principle local service participation. This is a matter which may well be considered by the two segments of the industry and our decision denying the request of Mohawk and North Central is without prejudice to any future agreement of this nature which may be filed.

We have given due consideration to all the contentions of the parties, and find, except to the extent indicated, that they do not alter our decision herein.

Accordingly, in view of the foregoing and all the facts of record, it is found that the Mutual Aid Agreement, including the amended Agreement filed on February 5, 1970, is not adverse to the public interest or in violation of the Act and should be approved, subject to the following conditions:

1. The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;

2. The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

excluded from the agreement, that Mohawk and North Central are late comers to this proceeding, and deferral of action on this agreement is unnecessary to afford them relief, and that the trunkline carriers are committed to extending full consideration to local service carrier participation in the agreement.

Under section 412 of the Act, the Board may always reconsider approval of an agreement if the facts indicate that continuing approval is adverse to the public interest. Mohawk and North Central are free to bring the issue before the Board at a later time if the trunkline carriers fail to afford them the proper consideration.

MURPHY and MINETTI, Members, Dissenting:

The record before the Board is incomplete and we would remand the case to the examiner for further proceedings. The agreement as submitted to the examiner involved seven trunkline carriers. It provided that "windfall" payments would be supplemented where necessary to provide a struck carrier with 25 percent of its normal operating expenses and that the annual maximum liability of any one carrier for supplemental payments would be limited to ½% of its operating revenues for the previous year.

However, subsequent to the initial decision, the carriers changed the agreement in three significant respects. The number of trunk carriers covered by the agreement was expanded so that the agreement is now essentially an industry-wide pact among trunk carriers.[1] The amount of supplemental payments to a struck carrier has been doubled to a full 50% of its operating expenses for the initial period of a strike and finally, the liability of each non-struck car-

[1] Only Northeast and Delta are outside the agreement and Northeast is seeking to merge with Northwest which is a pact member.

rier for supplemental payments has been doubled. The Board is now being asked to approve not the agreement which was before the examiner but a significantly revised version of that agreement. In our view, there is insufficient reliable or probative evidence before the Board upon which to judge whether the new agreement is or is not adverse to the public interest.

As the majority recognizes, the new agreement provides substantially greater recoupment of strike losses by the carriers than would the earlier agreement particularly in the first stages of a strike. In fact, if the present agreement had been in effect from the beginning, it appears that the struck carriers would have received mutual aid benefits in *excess* of their actual strike losses in at least five of the 18 strikes occurring during the period 1958-1968 on which cost information is contained in the record.[2] There is a serious question, therefore, whether the rate of payments under the new agreement is not set at so high a level as to encourage a carrier to accept a work stoppage rather than settle a labor dispute. Some affected parties contend there is a point at which supplemental payments would be high enough to have such an effect and we believe this aspect of the revised agreement, among others, must be fully explored before an examiner. In our view, basic concepts of administrative due process require no less.

We cannot join the majority in approving the agreement with these new provisions for an indefinite period of time solely on the basis of a record compiled in the light of significantly different provisions and the self-serving briefs by the parties.

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[2] See carrier exhibit 33.

ORDER

A full public hearing having been held in the above-entitled proceeding in Docket 9977 and argument having been received with respect to Agreement CAB 21445, and the Board, upon consideration of the record and the submission made, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That Agreement CAB 12633, as amended by Agreements CAB 12633A1 through A8, and Agreement 21445 (either hereinafter referred to as the "Agreement"), be and they hereby are approved, subject to the following conditions:

(a) The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;

(b) The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

(c) In accounting for the amounts due to others and the amounts due from others under the Agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by Part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating

to the operations of the Agreement as may be reasonably required by Director of the Board's Bureau of Operating Rights; and

(d) Copies of all arbitrators' decisions and awards issued under this Agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

2. That except to the extent granted herein, all applications, requests and motions involved in this proceeding be and they hereby are denied and the investigation instituted by Order E-26000 be and it hereby is terminated.

INITIAL DECISION OF EXAMINER ARTHUR S. PRESENT, MARCH 7, 1969

Preliminary Statement

For the third time the Mutual Aid Agreement (hereinafter referred to as the "Agreement") is before the Board. The original agreement among air carriers providing for mutual aid in the event of a strike, effective for only one year, was approved by the Board in 1959. *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168, reconsideration denied, 30 C.A.B. 90 (1959). The currently effective Agreement was approved by the Board in 1964 for a period of three years. *Mutual Aid Pact Investigation*, 40 C.A.B. 559. By timely application filed on May 2, 1967, the seven present Carrier Parties[1] to the Agreement

[1] American Airlines, Inc., Braniff Airways, Inc., Eastern Air Lines, Inc., Northwest Airlines, Inc., Pan American World Airways, Inc., Trans World Airlines, Inc., and United Air Lines, Inc.

ask the Board to renew the approval of the Agreement for an indefinite period.

Upon consideration of the application, answers filed by certain employee organizations requesting that the application be denied or, in the alternative, be set down for hearing, and a reply submitted by the Carrier Parties, the Board decided to institute this investigation to determine whether continued approval of the Agreement is not adverse to the public interest and not in violation of the Federal Aviation Act of 1958, as amended, and, if the Agreement should be approved, what terms, conditions, and limitations, if any, should be attached to the approval. Order E-26000, November 17, 1967. The Board's order also assigned the matter for hearing.

After due notice, public hearing was held. Initial and reply briefs have been filed.

The Agreement

The terms of the Agreement are set forth in Appendix A and were described in detail in the Board's prior decision, 40 C.A.B. at 573-577, 599-600. However, for the purposes of this decision, a brief resume may be helpful at this juncture.

The Agreement provides for mutual assistance in the event any party's flight operations should be shut down by a strike which has been called (1) for reasons which include the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States under section 10 of the Railway Labor Act and applicable to such party; or (2) in the absence of the establishment of such a board or in case such a board fails to make specific recommenda-

tions on the merits for the settlement of the issues in dispute and the struck party has in all respects complied with the Railway Labor Act; or (3) before the employees on strike have exhausted the procedures of the Railway Labor Act; or (4) otherwise unlawfully.

If a strike fulfilling the requirements of the Agreement should occur, the parties remaining in operation pay to the strike-bound carrier their increased revenues during the term of, and attributable to, the strike less applicable added direct expenses. Moreover, if these so-called "windfall" payments do not equal 25 percent of the normal air transport operating expenses of the flight operations shut down as a result of the strike, each operating carrier must pay a proportionate share ("supplementary" payment), limited in any one calendar year to an amount equal to one-half of one percent of its air transport operating revenues for the previous calendar year, of the sum needed to furnish the minimum percentage.

Only trunkline carriers are eligible to become parties to the Agreement. Any trunkline carrier which elects to become a party to the Agreement is liable for all payments it would have had to make if it had been a party on and after January 1, 1962, less all amounts which it would have been entitled to receive for such period. In lieu thereof, a carrier which had not been a party to the Agreement prior to January 1, 1962, may choose to become a party by giving six months' notice of its desire to become a party.

A party may withdraw from the Agreement as of December 31 of any year by providing at least 60 days' written notice. In such case, the carrier remains obligated, for a period of 12 months following the month in which the withdrawal became effective, to make the payments re-

quired by the Agreement to the extent it has received, on or after January 1, 1962, supplementary payments in excess of the supplementary payments it has made.

Pertinent Statutory Provisions

The basic statutory provision applicable is section 412 of the Federal Aviation Act of 1958, as amended, which covers certain agreements between air carriers affecting air transportation. Under subsection (b):

> The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; * * *

Section 102 of the Act requires that the Board consider in the public interest, among other things:

> (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

Furthermore, under section 401(k)(4) of the Act:

It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

Issues

The issues, as determined at the prehearing conference, are of broad scope. Without attempting to delineate all the subissues, and recognizing that there is some overlap among the issues stated, they are as follows:

Will renewal of the Agreement be adverse to the public interest?

If renewal of the Agreement is approved, what conditions, limitations, or restrictions, if any, should be imposed?

Have the existence of the Agreement and the activities pursuant to it been adverse to the applicable provisions or policies of the Railway Labor Act, as amended?

Will the Agreement result in restraints on competition or other forms of discrimination against air carriers which are not parties to the Agreement?

Will renewal of the Agreement adversely affect labor-management relations in the air transportation industry?

Has the existence of the Agreement prevented or encouraged the institution of industry-wide collective bargaining and, if so, is such a prevention or encouragement adverse to the public interest?

Has the existence of the Agreement resulted in a derogation of the duty to bargain collectively in good faith on the part of management or labor?

Will the renewal of the Agreement have an adverse effect on industrial peace and the public convenience?

Does the Agreement have the effect of directly or indirectly broadening Government participation in collective bargaining and labor-management relations?

Have the carrier parties to the Agreement complied with the reporting and other requirements as prescribed in prior Board orders?

What effect should actions of the Board such as the orders granting exemption authority to nonstruck carriers to provide additional service to points on their own route systems during the 1966 strike by the International Association of Machinists and Aerospace Workers (IAM) have in the instant proceeding?

How should the availability to struck carriers of military contract revenues affect the instant proceeding?

What have been the effects of the broadening of coverage of the Agreement, to include supplemental payments as well as windfall payments, since 1958?

However, as will become apparent from the contentions of the parties, described hereinafter, there is no controversy in regard to some of the issues.

Opinion

Contentions of Parties

Carrier Parties

The Carrier Parties request approval of the Agreement for an indefinite period. They contend that disapproval of the Agreement by the Board would contravene the national labor policy and constitute a gross abuse of the Board's discretion. It is their position that the Agreement represents a positive force in the airline industry by contributing to airline stability. Furthermore, they maintain that the Agreement has not adversely affected the collective bargaining process or labor relations on mutual aid carriers. Finally, the Carrier Parties aver that developments since the last proceeding strengthen the conclusion that the Agreement is consistent with the public interest.

Six Union Parties

The Six Union Parties[2] oppose the application and ask that the Agreement be disapproved as adverse to the public interest. They do not claim that the Agreement violates any specific provision of the Federal Aviation Act or of the Railway Labor Act, although they contend that the Agreement defeats the purposes of the latter statute. The Six Unions maintain that the Board's jurisdiction over the Agreement does not extend to the consideration of general labor policy, and the basic criterion to be applied concerns the impact of the Agreement upon industrial strife in the air transportation industry. Employing that standard, the Six Unions as-

[2] A joint presentation was made by the Air Line Dispatchers Association, the Brotherhood of Railway, Airline and Steamship Clerks, the Communication Workers of America, the Flight Engineers International Association (FEIA), the IAM, and the Transport Workers Union of America.

sert the Agreement has brought increased labor strife and interruptions to interstate air commerce. Moreover, they contend that the Agreement creates a conflict of interest in the conduct of labor-management relations in the air transport industry and that the Agreement is detrimental to the carriers. They urge that for these reasons the Agreement is adverse to the public interest and defeats the purposes of the Railway Labor Act.

Air Line Pilots Association, International

The Air Line Pilots Association, International (ALPA), notes that in the earlier proceedings it participated jointly with other unions and states that it is now appearing separately because of substantial changes in the industry and pilot-carrier labor relationships since the conclusion of the prior hearing and because of the serious impact of possible Board approval. ALPA requests denial of the application in its entirety or at least with respect to ALPA.

ALPA alleges that the Agreement is unnecessary, violates the Railway Labor Act with respect to multi-employer economic activity against employees, is inconsistent with Federal court decisions which limit the economic options available to a carrier during a strike, and is adverse to the public interest because it has not contributed to freedom from industrial strife or fostered sound economic conditions in the air transport industry; rather, it has functioned to disrupt the collective bargaining process and negatively affect pilot-carrier relationships.[3]

[3] By letter of December 26, 1968, ALPA requests the Examiner to strike from the record certain portions of the Carrier Parties' initial brief on the ground that those portions contain references to matters

Opinion

Allied Pilots Association

The Allied Pilots Association (APA) is the exclusive bargaining representative for the pilots in the employ of American Airlines, Inc. APA submits that renewal of the Agreement would be contrary to the public interest and the application should not be approved. APA contends that the Agreement increases the likelihood, and prolongs the duration, of work stoppages in the airline industry. As an alternative, APA urges that the Agreement should not be approved with respect to American or any other carrier which fails to demonstrate that its employees' interests and organizations are so interrelated with those of organized employees on other carriers that the carrier in question must, of necessity, conduct its industrial relations in concert with other carriers.[4]

Bureau of Operating Rights

The Board's Bureau of Operating Rights (Bureau) recommends that the Agreement be approved for a period of five years. It contends that the findings and conclusions

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not included in the record. The Carrier Parties answered by letter dated January 3, 1969, and ALPA replied in a letter dated January 6, 1969.

ALPA's letter of December 26 constitutes, in effect, a motion to strike governed by Rule 18 of the Board's Rules of Practice. As such, it must conform with Rules 3 and 4 of the Board's Rules of Practice. However, it does not comply with the requirements of the Rules, and neither does the answer or reply. In addition, no permission to file a reply was granted pursuant to Rule 18(c). In these circumstances, ALPA's letters and the letter of the Carrier Parties shall be disregarded.

[4] Although APA appeared at the hearing and participated in the cross-examination of Carrier Parties' witnesses, it did not present affirmative evidence and did not submit a brief to the Examiner. The position recited above was taken at the prehearing conference and presumably has not been changed.

made by the Board in the prior proceeding remain valid and the present record does not furnish a satisfactory basis for disapproval. The Bureau also maintains that the factual considerations which moved the Board to approve the Agreement for a temporary period—unresolved overcapacity problems and unsettled crew complement issues—are still applicable. Accordingly, the Bureau believes that the Agreement should be reexamined at some point in the future, and it suggests five years from July 1967 as a time consistent with the Board's prior temporary approval.

Discussion

In setting this matter for hearing, the Board sought the benefit of a record developed through a full evidentiary hearing to resolve the disputed questions of fact and important policy issues involved here. The Board said, "The investigation will furnish a means for a complete reexamination of the issues previously considered by the Board in the light of such new matters as may have developed since 1964." Order E-26000 at 2. Consequently, the focus of inquiry is on whether there is additional evidence or evolution in the law since the last proceeding which, considered alone or together with the record of the prior proceeding, call for a result different from that twice reached by the Board.

The Examiner has carefully considered the evidence and the contentions of the parties and, on the basis thereof, is convinced that the Agreement should be approved without a time limit. Events which have transpired since the last decision have been added to the record. Reference has been made to court decisions since the prior Board approval. Nevertheless, in the main, the essence of the

record and the arguments of the parties are the same as when previously reviewed by the Board. While details as to labor-management relations may differ since the record leading to the 1964 decision was developed, in substance there has been little change. And although some novel arguments have been advanced in the current proceeding, the applicable legal principles remain unaltered. In these circumstances, it serves no useful purpose to deal with all the contentions of the parties; such an approach would entail a detailed repetition of findings and conclusions in the prior Board decisions to an unnecessary extent. Accordingly, the Examiner will confine his discussion to those contentions which because of their importance or uniqueness merit comment.

Issues Not in Controversy

The parties have not adduced any evidence directed at anti-trust considerations. That matter was discussed in the prior decision. 40 C.A.B. at 581-582, and no departure from the findings and conclusions therein is warranted. Nor is there evidence that the Carrier Parties have failed to fulfill the requirements of prior Board orders involving the Agreement.

Role of National Labor Policy

In determining whether or not the Agreement is adverse to the public interest, there is substantial dispute over the place of national labor policy. The Carrier Parties contend that the national labor policy is incorporated into the public interest standard of section 412 of the Federal Aviation Act. They assert that the Board must give great weight to the national labor policy and must accomodate that policy to the considerations contained in section 102

of the Act. It is the position of the Carrier Parties that if the labor policy authorizes mutual employer self-help arrangements, such as that afforded by the Agreement, it would be an abuse of the Board's discretion to disapprove the Agreement in the absence of some unique and compelling air transportation consideration.

The Six Unions contend that the Board's jurisdiction over the Agreement does not extend to consideration of general labor policy. They quote from the Board's initial opinion on mutual aid as follows (29 C.A.B. 173):

> The range of our inquiry, however, is limited to a determination of the effect of the agreement upon these statutory objectives. [Refers to section 102 of the Federal Aviation Act.] Matters of general policy as to labor disputes are not to be considered by the Board in assessing whether the agreement is adverse to the public interest. It is the function of Congress, and not of the Board, to weigh the wisdom of such agreements as a factor in the furtherance of labor policies not directly related to the promotion of a sound air transportation system. [Footnote omitted.]

The Six Unions claim the Board has thereby made clear that the basic criterion to be applied to the Agreement is its impact upon industrial strife in the air transportation industry.

The language quoted by the Six Unions does not mean that the Board can, without adequate justification, override general labor policy in administering the Federal Aviation Act. Thus, before reaching the point in its opinion where the quoted language lies, the Board had directed its attention at whether the Agreement violated the Rail-

way Labor Act, which Act prescribes the national policy for labor-management relations in the air transportation industry. Moreover, section 401(k)(4) of the Federal Aviation Act expressly requires that air carriers holding certificates comply with the Railway Labor Act. Therefore, while it is not generally the role of the Board to regulate airline labor policies or to evaluate the advisability of arrangements in connection therewith,[5] when labor matters come to the fore in relation to the Board's functions under the Federal Aviation Act, the policies of that Act and national labor policies must be accommodated, one to the other. *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156, 172 (1962).

Any doubt in this regard was settled by the Board in the prior proceeding. The Board declared (40 C.A.B. at 609-610):

> Prior to the enactment of the Act, Congress had prescribed the national policy relating to the regulation of labor-management relations in the air transportation industry by the enactment of title II of the Railway Labor Act in 1936. In so doing, it placed the air transportation industry *in genere* with the railroad industry and within the framework of labor legislation which had developed in that industry since 1888. However, by subsequently enacting section 401(k) of the Act, Congress made compliance with the Railway Labor Act a condition for holding a certificate of public convenience and necessity and, as a consequence, made the Board an enforcing agency of the Railway Labor Act insofar

[5] "The Board's experience and expertise is with transportation not labor relations problems." *Oakland* v. *Civil Aeronautics Board*, 284 F. 2d 224, 228 (D.C. Cir. 1960).

as air carriers subject to the Act are concerned. Although Congress in that Act also gave the Board the prerogative to regulate the air transportation industry solely as required by the public interest objectives set out in section 102 of the Act, it did not by this legislation transfer the general regulation of labor-management relations in the industry to the Board. Although the Board is invested with plenary authority within its sphere, its competency is in the field of air transportation and not in the area of labor relations. It follows, therefore, that although not proscribed from regulating labor management relations in the industry, it should exercise extreme circumspection when acting within its sphere of authority over air transportation so as not to affect labor-management relations in a manner contrary to the national labor policy, unless, as in the correlated area of antitrust confliction, it finds its action is required "by a serious transportation need in order to secure important public benefits." In order to refrain from indirectly interfering with the national labor policy affecting air transportation embodied in the Railway Labor Act, it should accommodate its responsibilities under the Act to the provisions of the Railway Labor Act, if it is feasible to do so. [Footnotes omitted.]

This point was emphasized again later (40 C.A.B. at 614-615):

> The Government's traditional passive role in the collective bargaining process is particularly applicable to the Board since, under the Act, its authority over labor management relations in the air transporta-

> tion industry is incomplete, being limited to the regulation of only one party, the carrier. In addition to the statutory limitation of its authority, the Board and the courts have recognized that the competency of the Board lies in air transportation and not in the labor-management relations area. In the opinion of the examiner, a policy decision curtailing the use by air carriers of an economic weapon not invalid under the national labor policy, in the absence of a manifest substantial "need," would be an improvident exercise of discretion. * * * [Footnote omitted.] [6]

Accordingly, the Board must heed the national labor policy, and it must accommodate the objectives of the Federal Aviation Act to the purposes of the national labor policy. The Board cannot properly take action derogating from the national labor policy unless required by a serious transportation need.

Agreement and National Labor Policy

The Carrier Parties declare that the Agreement is sanctioned by national labor policy, which permits the parties to a major labor dispute to resort to self-help in settling their differences once the procedures of the Railway Labor Act have been exhausted. The Carrier Parties urge that the government is forbidden to interfere with the bargaining tactics used by the parties to the collective bargaining process unless such tactics are independently illegal. It is their position that mutual employer financial assistance is within the ambit of permitted activity in labor disputes.

ALPA challenges the position of the Carrier Parties. It contends that the Agreement, as applied to ALPA, is not

[6] See also 40 C.A.B. at 562.

reconcilable with the limitations of national labor policy and the Railway Labor Act on multi-employer economic activity against employees. ALPA also maintains that the Agreement does not constitute proper carrier self-help under the Railway Labor Act because carriers subject to that Act must limit their responses to a strike on an *ad hoc* basis in accordance with the particular situation.

The previous Board decisions did not conclude that the Agreement is inconsistent with national labor policy or the Railway Labor Act. None of ALPA's arguments persuade the Examiner that a different result should obtain now.

In support of the position that the Agreement cannot properly be applied to it, ALPA asserts that (1) multi-employer economic measures against employees are limited to multi-employer bargaining units, and (2) multi-employer economic action to protect multi-employer bargaining units can be invoked only when the multi-employer bargaining units are confronted with activity directed at their common front or integrity, citing *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87 (1957), known as the "Buffalo Linen" case, *Labor Board* v. *Brown*, 380 U.S. 278 (1965), and *New York Mailers' U. Number Six, Inter. Typo. U.* v. *N.L.R.B.*, 327 F. 2d 292 (2nd Cir. 1964). These cases do not sustain ALPA's position.

All of the cases cited by ALPA involved lockouts of their employees by employers joined in multi-employer bargaining associations. In every case, the charge that such self-help violated the National Labor Relations Act was rejected by the Court. Nevertheless, in substance, ALPA argues that because these cases involved multi-employer bargaining associations a different conclusion would prevail with respect to the Agreement inasmuch as the carriers do not bargain collectively with ALPA. The Examiner finds noth-

ing in these cases which supports ALPA's argument. Indeed, the *Buffalo Linen* case was cited by the Board in its 1964 Board opinion in buttressing the conclusion that the Agreement represents legitimate self-help.[7]

In any event, *Kennedy* v. *Long Island Railroad Company*, 211 F. Supp. 478 (S.D. N.Y. 1962), *aff'd.*, 319 F. 2d 366 (2nd Cir. 1963), *cert. denied*, 375 U.S. 830 (1963), disposes of ALPA's position. That case involved a strike insurance plan among railroads quite similar to the Agreement. The Brotherhood of Railroad Trainmen (BRT) had struck the Long Island Railroad Company, and the latter received assistance under the strike insurance plan. Subsequently, BRT and its officers filed a suit for money damages against the Long Island, 22 other railroads, the Association of American Railroads, and a bank alleging that the strike was the proximate result of the strike insurance and that the strike insurance arrangement violated the Railway Labor Act, the Interstate Commerce Act the Sherman Act, and was tortious under New York law. The complaint was dismissed, and the strike insurance plan was held lawful. Thus, this case upheld the legality of multi-employer mutual aid where a single union went on strike against an individual railroad.

ALPA argues that the *Kennedy* case does not incorporate limitations on multi-carrier activity different from the cases previously discussed. To support this position, it quotes the following statement from the court's opinion (211 F. Supp. at 488):

> Multicarrier bargaining of labor demands, referred to as regional and national handling, has been and

[7] 40 C.A.B. at 607, n. 2[a]. Nor is *N.L.R.B.* v. *Milk Drivers & Dairy Emp. Local Union No. 584*, 341 F. 2d 2[a] (2nd Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), also cited by ALPA, apposite.

> is (since the Act) the customary method of collective bargaining.

ALPA also asserts that it does not appear from the court's opinion that any argument was raised to the effect that the railroad insurance plan could not be applied to situations involving single-carrier bargaining.

At the outset, it should be noted that ALPA's entire argument is predicated on a spurious premise. For, as the Examiner has discussed, the cases cited by ALPA do not place limitations on multi-carrier self-help activity.

Moreover, ALPA's contentions do not square with the court's opinion in the *Kennedy* case. The statement quoted by ALPA from the *Kennedy* case was made in the course of a discussion in which the court rebuffed plaintiffs' contention that the strike insurance plan violated the Railway Labor Act by introducing an element of multi-party bargaining without the plaintiffs' consent. The essential point made by the court is that plaintiffs erred in their assumption that the Long Island, by receiving strike benefits to which other railroads had contributed, was being financed to represent an industry-wide point of view and the interests of others instead of only its own interests vis-a-vis plaintiffs. Clearly the situation concerned single-union and single-carrier collective bargaining, and, in that context, the court sustained the program of mutual aid among the carriers.

ALPA further contends that the *Florida East Coast Railway* cases[8] establish that carriers subject to the Rail-

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[8] *Florida E.C. Ry. Co. v. Brotherhood of R. Trainmen*, 336 F. 2d 172 (5th Cir. 1964), *cert. denied*, 379 U.S. 930 (1965); *Florida East Coast Railway Company v. United States*, 348 F. 2d 482 (5th Cir. 1965), *aff'd., sub nom., Railway Clerks v. Florida E.C.R. Co.*, 384 U.S. 238 (1966).

way Labor Act and faced with a strike may not take whatever economic action is thought necessary by management but must limit their response on an *ad hoc* basis in accordance with the particular situation at hand.

These cases in no way detract from the validity of the Agreement in light of national labor policy. They did not involve the question of the nature of the self-help to which a carrier could resort when the processes of the Railway Labor Act had in all respects been exhausted or the strike was illegal. Rather, the cases concerned a situation where the railroad, suffering a lawful strike, unilaterally changed existing collective bargaining agreements without pursuing the steps required by the Railway Labor Act. The courts held that even in these circumstances the railroad could turn to self-help in order to fulfill its obligation to operate, but, with regard to matters still subject to the procedures of the Railway Labor Act, such self-help was restricted to measures reasonably required to conduct operations.[9]

The Examiner concludes that the Agreement is fully consonant with national labor policy. Furthermore, the application to renew the approval of the Agreement must be granted unless such action would conflict with the provisions, or defeat the purposes, of the Federal Aviation Act.

Public Interest Considerations

It is appropriate now to view the Agreement in light of the public interest standard of section 412 of the Federal Aviation Act.

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[9] It was left with the United States District Court Judge to pass on the changes necessary to continue operations. Compare with *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

Stability of Airlines

The promotion, encouragement, and development of air transportation are cardinal objectives of the Federal Aviation Act. The Agreement advances these aims by shoring up airline stability.

In its last opinion, the Board found (40 C.A.B. at 561):

> Air carriers are particularly vulnerable to strikes, and the industry has, in the recent past, been plagued by strikes. The Pact [Agreement] offers, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, in this fashion and to this extent contributing to industry stability.

Developments since the prior proceeding further support the contribution of the Agreement to airline stability.

There have been two major strikes against parties to the Agreement since the last proceeding. In 1965, ALPA was on strike against Pan American for ten days. In 1966, IAM struck four parties to the Agreement (Eastern, Northwest, TWA, and United) and National Airlines, Inc.,[19] for 43 days.

The loss to Pan American during the period of the ALPA strike amounted to $5,848,000. Mutual aid covered approximately 59 percent of this loss, so that the net strike loss was $2,412,000 before taxes. In addition, as a consequence of the strike, Pan American's post-strike losses, for which no mutual aid is available, constituted an estimated $2 million.

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[19] National became a party to the Agreement on March 11, 1960, but withdrew effective December 31, 1961.

The 1966 IAM strike produced strike-period losses for parties to the Agreement as follows (in millions):

	Eastern	*Northwest*	*TWA*	*United*	*Total*
Loss	$26,079	$17,008	$58,600	$61,131	$162,818
Less: Mutual Aid	7,667	2,492	17,962	17,943	46,064
Net Strike Loss	$18,412	$14,516	$40,638	$43,188	$116,754

The heavy, adverse effect of the strike is evident from the foregoing data.[11] But mutual aid did serve to soften the losses by approximately 28 percent.[12]

The evidence demonstrates that the Carrier Parties currently need financial stability and that such a need will continue into the future. Over the five-year period 1963 through 1967, the rate of return on investment of the Carrier Parties, excluding the tax savings resulting from investment tax credits, ranged from 6.1 percent in 1963 to 11.4 percent in 1965.[13] For 1967, the rate was 7.6 percent. These percentages may be compared with the average of 10.5 percent found by the Board in the *General Passenger-Fare Investigation*, 32 C.A.B. 291, 308-309, 331 (1960), to be a fair and reasonable rate of return, albeit

[11] From the inception of mutual aid to the present, there have been 20 strikes on carriers party to the Agreement which involved the payment of mutual aid. The losses for the periods of the strikes totaled $247 million before mutual aid, mutual aid payments amounted to $82 million, and the net strike losses before income taxes comprised $165 million.

[12] The Carrier Parties did not furnish the savings in income taxes flowing from the losses.

[13] The rate of return for 1966 was 9.8 percent. The Carrier Parties estimated that if the 1966 IAM strike had not occurred the rate of return would have been 12.3 percent. If the investment tax credit were applied, all rates of return would be approximately one percentage point higher.

not a minimum return. Moreover, the long-term debt of the Carrier Parties doubled in the five-year period from 1963 through 1967, reaching $2.7 billion in the latter year, producing larger, fixed interest costs. In addition, projections show capital expenditures of $7.9 billion in the period 1968-1971. It appears, therefore, that the Carrier Parties fully need their existing financial resources and must develop even greater financial resources internally and externally, to meet their future capital and operating requirements. The record, which goes back to 1946, shows no year strike free. This history signifies that steps to bolster the foundation of the airlines' financial capabilities are not unreasonable and are consistent with the public interest.

ALPA avers that there is no evidence that strikes have jeopardized the financial stability of the Carrier Parties. However, the mutual aid received by Eastern as a consequence of the 1962 FEIA strike was essential to maintain an acceptable cash position and avoid default under the working capital requirements of the loan agreements then in effect.

ALPA submits a number of other contentions directed at demonstrating that the Agreement is no longer needed by the Carrier Parties, at least in regard to the pilots. These contentions concern favorable changes for the industry over the decade since 1958, improvements in labor relations, other avenues of support available to the carriers, and the lack of comparability between pilot strike benefits and assistance pursuant to the Agreement.

Regarding favorable changes in the industry, ALPA points out that the airlines have virtually completed upgrading to jet fleets. This does not mean, however, that the airlines will enjoy problem-free days in the future. The

integration of the Boeing 747 and like aircraft, the operation of supersonic aircraft, and the introduction of other aircraft as yet unknown, no doubt will confront the airlines with sizeable problems, both with respect to operations and financially.

ALPA claims the Carrier Parties have improved financially and expect continued growth. Judgments as to airline financial status at any given point of time are not dependable. A fundamental aspect of the airline industry is the cyclical nature of its earnings. *General Passenger-Fare Investigation*, 32 C.A.B. 291, 328 (1960); *General Passenger-Fare Investigation*, 17 C.A.B. 230, 234-235 (1953). Moreover, the Board recently determined that higher fares for the industry are warranted. *Domestic Trunkline Carriers, Proposed Fare Increases*, Order 69-2-98, February 19, 1969. In any event, even if it were to be concluded that the Carrier Parties have improved financially, as already discussed, sustained financial stability of the airlines is vital to continued growth and the Agreement affords some help in maintaining the necessary stability.

ALPA contends that the record does not establish that the Carrier Parties are increasingly or particularly vulnerable to strikes or that any decline in profits is attributable to pilot-carrier labor relations. ALPA points out that in 1965, when Pan American suffered a pilots' strike, the carrier's earnings were higher than in 1964.

Whether or not the Carrier Parties are increasingly or particularly vulnerable to strikes is of no great significance. The fact is that the Carrier Parties are vulnerable to strikes. Thus, there are immediate and direct losses during the period of a strike when revenues are lost while many expenses continue. In addition, anticipated profits are not

realized. Moreover, there are post-strike losses with revenues increasing more slowly than expenses. Furthermore, there is the real danger that traffic which transferred to a competing carrier during the course of a strike will remain with that carrier. The Agreement plays a part in ameliorating such problems. With regard to the 1965 strike against Pan American, manifestly, the carrier's profits in 1965 would have been larger but for the losses suffered by it during the ALPA strike.

Accepting the proposition submitted by ALPA that pilot-management relations in the industry have improved in no way justifies denial of the application. The improvement in labor relations does not preclude pilots from going on strike if they consider such action warranted. Accordingly, it is not inconceivable that at some future time the Carrier Parties may need to resort to the Agreement to secure a measure of relief against a strike by pilots.

ALPA urges that the Carrier Parties do not need the benefits of the Agreement because pilot no-strike agreements covering military flight operations provide additional strength to the carriers and Board exemption orders during major labor disputes maximize windfall benefits to struck carriers.

As the Board made clear in its initial opinion on mutual aid, allegations concerning relative employee-employer bargaining powers must be disregarded "unless the asserted imbalance in labor-management relations poses a threat to the development of a stable and efficient air transportation system." 29 C.A.B. at 173. Certainly, even when considered with the factors noted by ALPA, the Agreement does not cause such an imbalance. Thus, despite the availability of military contract revenues,[11] the issuance of

[11] See Appendix B.

exemptions by the Board broadening the operations permitted non-struck carriers,[15] and mutual aid, in 1966 the Carrier Parties still suffered the large strike losses previously set forth (see p. 19, *supra*.).

The contention that there is a lack of comparability between pilot strike benefits and assistance under the Agreement must also be cast aside for reasons indicated in the preceding paragraph.[16] Moreover, there is no evidence that the pilots have suffered through any disadvantage in bargaining power. Despite the existence and application of the Agreement, pilots' wages have increased substantially and they have gained improved working conditions and enhanced fringe benefits through the collective bargaining process.

Labor Relations

The Six Unions allege that the Agreement has brought increased labor strife and interruptions to interstate air commerce. They contend that since the Agreement has been in effect there has been an average yearly increase of 1.2 strikes, or approximately 35 percent, in the airline industry and the average length of the strikes has risen by approximately 15 percent. Moreover, they assert that in the period from the last Board approval of the Agreement through 1967 there has been a similar increase in the number of

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[15] See, for example, *Emergency Air Transportation Requirements*, Order E-23028, July 9, 1966. The record does not indicate the effect of the exemption orders on the Carrier Parties. Of course, there is no way of foretelling whether any future strike would move the Board to issue similar exemption orders. No such order was issued in connection with the pilots' strike against Pan American in 1965.

[16] In any event, before a meaningful comparison could be made, it would be necessary to introduce into the record evidence (now absent) showing the financial resources of the individual pilots as well as their financial obligations.

strikes and the average length of each strike as compared with the pre-Agreement period. The Six Unions claim that even if strikes growing out of the crew complement issue were eliminated there would be an increase over the pre-Agreement period in the number of strikes and a substantial increase in their average length.

In the last proceeding, the Board rejected this statistical approach of imputing increased labor strife to the Agreement. The Board said (40 C.A.B. at 562-563):

> The unions claim * * *: "Once the record demonstrates that there has been an aggravation of labor disputes and an increase in labor strife within the air transport industry under the Pact, it is submitted that there is a prima facie case that the Pact violates the public interest and that the burden then rests upon the carrier parties to demonstrate that this increase in labor strife cannot be attributed to the Pact."
>
> In our opinion the bare fact that there may have been a deterioration in labor-management relations during the period of operation of the Pact covered by the record does not raise a presumption that the deterioration was caused by the Pact, and such fact, standing alone, does not make out a "prima facie case" that the Pact violates the public interest.

Furthermore, the data persuade the Examiner that the Agreement has not led to increased labor strife. If there is any significance in the data advanced by the Six Unions, it lies in comparing strikes against parties to the Agreement (*i.e.*, an air carrier which was a party to the Agreement at the time it suffered the strike) with strikes against other

air carriers. Such a comparison discloses no important difference in the number of strikes or their duration.

Since the Agreement has been in operation, the number of strikes, the number of days flight operations were halted, and the average number of days flight operations were shut down per strike, have been as follows:

	Parties to Agreement[17]	*Other Air Carriers*[18]	*Total*
Strikes	25	20	45
Days Flight Operations Halted	707	586	1,293
Average Days per Strike	28	29	29

An analysis of strikes since the last decision of the Board approving mutual aid yields the following data:

	Parties to Agreement	*Other Air Carriers*	*Total*
Strikes	6	9	15
Days Flight Operations Halted	183	250	433
Average Days per Strike	31	28	29

Because the 1966 IAM strike possessed singular aspects (discussed *infra*, pp. 34-37), the results of eliminating that strike from consideration are noteworthy. With respect to strikes since the Agreement went into effect, the data are as follows:

	Parties to Agreement	*Other Air Carriers*	*Total*
Strikes	21	19	40
Days Flight Operations Halted	535	543	1,078
Average Days per Strike	25	29	27

[17] See Appendix C.

[18] See Appendix D.

Since the last Board decision on mutual aid the data are:

	Parties to Agreement	*Other Air Carriers*	*Total*
Strikes	2	8	10
Days Flight Operations Halted	11	207	218
Average Days per Strike	6	26	22

In view of the foregoing, extended comment is unnecessary on the Six Unions' claim that eliminating strikes attributable to the crew complement issue would not yield a different result. However, it is noteworthy that in the prior proceeding the Board found that "the controversy between two unions over jurisdictional representation of flight crew members has been the primary cause of labor-management disputes, at least since 1958." 40 C.A.B. at 563.[19]

Moreover, the emphasis placed by the Six Unions on the number and length of strikes ignores the fact that in the period 1958-1968 the Carrier Parties to this proceeding negotiated 221 labor contracts. In addition, in the last six years, Pan American, TWA, and United have reached a total of six agreements providing for arbitration of unresolved issues in major disputes. The large number of negotiated settlements without recourse to strikes is further evidence that the Agreement is not an impediment to labor peace.

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[19] Appendix E contains a list of strikes involving carriers party to the Agreement, indicating those ascribable to the crew complement controversy, as taken from the initial brief of the Six Unions. The Six Unions have not attributed to the crew complement controversy certain strikes which the Board found did stem from that controversy. These are the American and Eastern strikes in 1958 (40 C.A.B. at 620), strikes against Northwest and Pan American in 1960 (*Id.* at 621), and a strike against Pan American in 1962 (*Id.* at 624). Furthermore, National was not a party to the Agreement at the times it suffered strikes in 1964 and 1966.

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The Six Unions also maintain that the Agreement has created mistrust in the minds of employees and serves as an irritant to the employer-employee relationship in the industry. The airline coordinator for IAM testified that union members term the Agreement a "strike breaking" arrangement.[20] ALPA argues that the mere risk that the Agreement will lead to an otherwise unnecessary work stoppage is sufficient to deny renewal.

The Agreement cannot properly be disapproved on the basis of subjective factors such as mistrust in the minds of employees. With regard to ALPA's contention, if there should be an unnecessary work stoppage, the employees would be the ones to embark upon such a maneuver. If substantial weight were given to these contentions, the logical extension would call for stripping the air carriers of all means of self-help. It would be manifestly unfair to confine the resources for self-help available to air carriers when the Board has no jurisdiction over the unions and cannot regulate the weapons of self-help they might use. Moreover, the Board would be unwarranted in taking such a step, *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 490 (1960), unless justified by its duties pursuant to the Federal Aviation Act.

From an objective point of view, the evidence does not show that the Agreement has had any important effect on labor-management relations. Two union representatives testified. The testimony of the IAM witness and other evidence establish that the union makes its proposals on the basis of what it believes its members are entitled to earn and that the Agreement has not deterred the union from battling for and gaining its objectives. The testimony of the

[20] Certain characterizations in the introductory clauses of the Agreement are ill-suited for facilitating labor-management relations.

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ALPA witness reveals that, despite the existence of the Agreement, the pilots and carrier management have been able to settle their differences in recent years based on mutual trust. Moreover, the witness recognized that most contract negotiations in the industry during the past decade had concluded with agreements reached in the absence of strikes or lockouts and declared that this was "due to a problem solving atmosphere taken by both the management and the unions themselves." (Tr. 431). He anticipates labor peace, as far as the pilots are concerned, for the foreseeable future unless the carriers should attempt to make fundamental changes in existing collective bargaining agreements. In the opinion of this witness, the Agreement had no effect on the resolution of the crew complement issue which plagued the industry in the early days of jet operations. He also indicates that the Agreement has had little impact on the formulation of the issues by the parties to collective bargaining or on the solution of the issues.

From the carriers' standpoint, the evidence also shows that the Agreement does not play a role in the development of carrier bargaining positions or during the negotiating process. It is only at the point a strike appears imminent that the carriers give consideration to the Agreement in deciding whether to suffer the strike.

The evidence establishes, therefore, that the Agreement has had little, if any, impact on labor-management relations.

The Six Unions state that the basic test of the impact of the Agreement upon the public interest is the Agreement's success in avoiding or reducing the number and length of strikes which occur. Similarly, ALPA contends that the record does not indicate that the Agreement has contributed to improvements in labor relations.

However, to gain approval under section 412 of the Federal Aviation Act, the Agreement need not have a favorable bearing on labor relations as long as it does not exacerbate labor relations to the extent of impeding attainment of the objectives of section 102 of the Act. Thus, as pointed out by the Board when it first approved mutual aid, the question is only "whether the agreement threatens, by aggravation of labor disputes, to hinder achievement of the objectives set forth in section 102 of the Federal Aviation Act." 29 C.A.B. at 173. Accordingly, the contentions of the Six Unions and ALPA must be rejected.

Collective Bargaining Process

An integral part of the subject of the preceding section is the question of the effect of the Agreement on the collective bargaining process. Consequently, much of the discussion in the preceding section applies here also. Some additional comment is appropriate, however.

To show the effect of the Agreement on the collective bargaining process, the Six Unions assert that the Agreement was a contributing factor to IAM's position during the 1966 negotiations. In support, they rely on direct testimony of the IAM airline coordinator as follows (Tr. 539-540):

> Q. In your opinion, did the Mutual Aid Pact have any effect upon the IAM position during the negotiations?
>
> A. Well, I think it was one of the contributing factors. I think that due to the reluctance on the part of the carriers to make any type of an offer for such a long extended period of time, and then following an emergency board report which they reluctantly said, "We will agree that," that they did

> not make a proposal that in my opinion they knew they were going to eventually have to make to avoid the strike. It was quite obvious to me that the Mutual Aid assistance that they would receive from non struck carriers played a very prominent part in it.

The testimony does not indicate that IAM changed its bargaining position in any respect because of the Agreement. Rather, the testimony shows that IAM determined to strike against the carriers because the latter failed to submit a proposal satisfactory to IAM.[21]

If there is any doubt on this score, it should be eliminated by the following testimony of the witness on cross-examination by counsel for the Carrier Parties (Tr. 565-566):

> Q. One other question I wanted to ask you: Does the existence of the mutual aid agreement have any effect on the demands served by IAM on airline members to the agreement?
>
> A. On the demands that we are proposing?
>
> Q. Either at this time or any negotiation?
>
> A. No, I don't say they have. We make proposals based upon what we think the members are entitled to. The question as far as mutual aid is concerned is the deterrent that it represents to keep us from getting those things.
>
> Q. Do you figure it is a deterrent to your achieving your demands?
>
> A. Definitely.

[21] The absence of a suitable proposal from the carriers was attributed by the witness to their reliance on the support furnished under the Agreement.

Opinion

ALPA contends that the Agreement functions to disrupt the collective bargaining process. The union claims that the objective of the Agreement is to change the relative positions of the parties in collective bargaining. ALPA concedes that the question of imbalance at the bargaining table is beyond the scope of the proceeding, but it maintains that the Board may consider the principal objective of the Agreement insofar as it negatively affects the collective bargaining process. To support its position, ALPA asserts that the Agreement has the effect of changing carrier bargaining attitudes and positions in the period immediately prior to announced strikes by lowering the cost of suffering a strike, decreasing the sense of urgency to reach agreement, and exaggerating open issues through the increase in carrier economic strength derived from the Agreement. ALPA argues that the objective of changing bargaining relationships through increased carrier economic strength is not based upon any legitimate business end and that the Agreement represents a carrier attempt to secure economic strength and a bargaining advantage without formal amendment of the Railway Labor Act. ALPA urges that the Agreement is unsuitable to relationships which must rely for their success on mutual confidence and respect and that it is a tax on those carriers which maintain a constructive relationship with their employees.

These contentions have been considered by the Board in the past proceedings and discarded. In its original decision on mutual aid, the Board rejected the contention that the Agreement would detract from the carriers' obligation under the Railway Labor Act to bargain in good faith and would interfere with the prompt settlement of disputes.[22]

[22] The opinion of the Court of Appeals in the *Kennedy* case cites the 1959 Board decision as a "recent and authoritative decision" demonstrating that a mutual assistance agreement "quite similar to the strike insurance plan before us" is no impediment to good faith bargaining. 319 F. 2d at 372.

The Board pointed out that the substantial losses even with mutual aid plus possible permanent diversion of traffic to competing carriers were powerful incentives to avoid strikes. 29 C.A.B. at 171. On reconsideration, the Board further underlined the Congressional intent in the Railway Labor Act to permit the parties "to engage in reciprocal tests of economic strength within the framework of collective bargaining." 30 C.A.B. at 92. In the last proceeding it was found (40 C.A.B. at 628):

> There is no substantial evidence in the record that the Pact has had any material effect upon the collective bargaining process in the industry. Nor does the record indicate that the Pact has resulted in actions by the Pact members repugnant to the purposes and spirit of the Railway Labor Act.[76]

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[76]In fact, disregarding negotiations in which the jurisdictional flight crew controversy overrode the economic considerations, the record shows that the carriers have not experienced any difficulty in negotiating contracts with the air transport unions since 1958.

It also said (40 C.A.B. at 631):

> Although the supplemental payments provision, even as its liability is diminished by "windfall" payments, appears to be a costly form of insurance for a prudent management of a carrier with stable labor relations to underwrite, no one carrier is immune from labor difficulties and the exercise of management discretion in this respect is not subject to review in this proceeding. The overall effect of the agreement on the Pact members as a group appears minimal, although the effect on profits or losses of in-

dividual carriers may be severe. As an insurance arrangement it is economical, in that costs of administration are minimal, with no override such as would be payable in the case of commercial insurance, and no interest payable. Moreover, the carriers have not given a "blank check" to a member carrier to obligate them without limitation for strike losses. The limitation of liability in any one calendar year, based upon one-half of 1 percent of the adjusted air transport operating revenues for the prior calendar year, is keyed to a degree to the ability to pay and is not so large as to cause the paying carrier to get into financial difficulty from this expense alone. On the other hand, the agreement is of use only for brush fires and not holocausts since in the case of a single carrier strike involving one of the larger carriers, the maximum liability would be exhausted in 51 to 85 days, but in the event of simultaneous multicarrier strikes, such as the illegal strike of February 1961, the maximum payments would have been exhausted in 4.8 days.

The examiner's scrutiny of the financial provisions of the agreement does not confirm the Bureau's fear that the agreement financially is of such strength as to create an imbalance in bargaining positions adverse to the public interest objectives. The insurance provision is not attractive enough financially to cause the carriers to refrain from negotiating collective bargaining agreements in good faith or to invite unnecessary strikes for the purpose of presenting an industry position. While admittedly costly, the agreement does not impose a financial burden upon an individual carrier member which would affect its capability to fulfill its obligations under

> the Act, nor is the liability of the carriers as a group so great as to interfere with the development of a sound economic air transportation industry. [Footnote omitted.]

ALPA's contentions carry no more weight now than in the past, and the factual allegations are not sustained by the evidence developed at the hearing.

Furthermore, if the occasion should arise when the Carrier Parties employ the Agreement as a shield against good faith bargaining, the unions have recourse.

The Railway Labor Act, section 2, First, provides (45 U.S.C.A. § 152):

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Thus, if the carriers fail to bargain in good faith, they would violate that Act. Upon appropriate application, either the courts or the Board will require the carriers to bargain in good faith. *Ruby* v. *American Airlines, Inc.*, 329 F. 2d 11 (2nd Cir. 1964);[23] *Air Line Pilots* v. *Southern Airways, Enforcement*, 36 C.A.B. 430 (1962).[24]

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[23] Judgment vacated and case remanded to the District Court with direction to dismiss the complaint as moot, *sub nom., O'Connell* v. *Manning*, 381 U.S. 277 (1965).

[24] Petition for review dismissed as moot, *sub nom., Southern Pilots Association* v. *Civil Aeronautics Board*, 323 F. 2d 288 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 954 (1964).

Detriment to Carriers

The Six Unions aver that the Agreement is actually detrimental to the Carrier Parties because the Agreement provided the margin which persuaded the carriers to undergo the 1966 IAM strike and the strike cost the carriers a substantially greater sum than if they had accepted the original union demands.[25] They suggest that there is a substantial question whether the carriers intended to negotiate in good faith, noting that for those difficult negotiations the carriers appointed as a principal spokesman an individual who had no prior experience in labor relations under the Railway Labor Act. They further contend, to support this position, that the carriers did not make a proposal on the economic issues until the very end of the mediation sessions under the auspices of the National Mediation Board (NMB).

Plainly, it is in the interests of the carriers to avoid strikes. Any strike results in economic loss. Nevertheless, occasions arise when a carrier believes it is more in its interest to suffer a strike than to acede to union demands. The Six Unions would have the Board, on a hindsight basis, judge whether the carriers were wise to undergo the 1966 IAM strike.

It is unnecessary to enter into the murky atmosphere surrounding the contentions of the Six Unions, for the record

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[25] This contention takes into account the original union demands and the final settlement terms and also the strike losses suffered by the carriers as estimated in "Study of the Financial Impact on the Airline Industry of the IAM Strike," Civil Aeronautics Board, July 1967. Although there is a dispute between IAM and the Carrier Parties regarding the dollar values of the original union demands and the final settlement terms, the Six Unions have employed the Carrier Parties' estimates. On these bases, the Six Unions claim the carriers would have been better off in the amount of $74.7 million if they had accepted the original union proposal.

simply does not contain reliable and probative evidence to support the claim that the availability of mutual aid was the determinative factor in inducing the carriers to take the 1966 strike.

Significantly, one of the carriers struck was National, a carrier not a party to the Agreement. And IAM's airline coordinator made it clear that National was not a weak factor in the negotiating process.

The fact that the carriers' principal spokesman had no prior experience in labor relations under the Railway Labor Act lends little support to the Six Unions' position. The principal spokesman was not a neophyte in labor negotiations. He had had approximately ten years of experience in such negotiations pursuant to the National Labor Relations Act, and, in addition, the negotiating committee included expert carrier representatives.

Moreover, the carriers did attempt to reach a settlement prior to the strike. They made an offer during the course of mediation. Furthermore, following the failure of mediation efforts, the NMB profferred arbitration. The proposal was accepted by the carriers and refused by IAM. Later the carriers accepted the recommendations of an Emergency Board appointed by the President of the United States pursuant to section 10 of the Railway Labor Act as a basis for settlement, but IAM declined to submit the recommendations to its membership. The recommended settlement would have resulted in an average annual pay increase of 3.6 percent as compared with 3.2 percent in the President's Wage-Price Guidelines.

The real goal of IAM in this controversy appears to have superseded immediate objectives peculiar to the airline industry. Thus, IAM, with a total membership of approximately 1,025,000, only 68,000 of whom are employed in the

air transport industry, strove to demolish the President's Wage-Price Guidelines and succeeded in doing so.

The focus of IAM on the wage-price guidelines is plain from the statements of union leaders. In March 1966, an IAM vice president explained the union's refusal to accept the NMB's offer to arbitrate on the ground that arbitration would be detrimental to IAM members "considering the present atmosphere with so-called guide lines for wage agreements." Carrier Ex. 26, Att. B, p. 1. In a letter transmitting the ultimate contract terms to the membership for their assent, the president of the IAM declared that the agreement "destroys all existing wage and price guidelines now in existence; in fact, it completely shatters them for all unions." Carrier Ex. 26, Att. J, p. 2. Again, the president of IAM, in remarks made on January 23, 1968, before the Western Conference of the Brotherhood of Teamsters, said about the 1966 strike, "As a further result we broke the administration's attempt to limit worker's wages—though not management profits—through the so-called guidelines," and "It resulted in one of the best settlements we ever achieved in this industry—and it buried the Government's guide lines—forever, we trust." Carrier Ex. 26, Att. K, p. 2. Finally, at the opening of the 27th convention of the IAM on September 3, 1968, the president of the organization referred to past problems with Congress and the White House "especially when we broke the wage guide lines in the air transport strike of '66." Carrier Ex. 26, Att. L, p. 3.

In view of IAM's emphasis on destroying the President's Wage-Price Guidelines, it does not seem that the carriers could have avoided the 1966 strike unless they joined with IAM in a challenge to the guidelines.

Government Participation

ALPA submits that the Agreement adversely affects the collective bargaining process by encouraging and involving government participation through the Civil Aeronautics Board. According to ALPA, the Agreement improperly encourages the Carrier Parties to rely on Board action approving the Agreement for added economic strength.

Contentions regarding Board participation in labor disputes were raised in the last proceeding and found lacking in merit. 40 C.A.B. at 584-586. Here, ALPA takes the unusual approach that air carriers are not justified in entering into an arrangement which, because of the provisions of the Federal Aviation Act, requires Board approval and which, if approved, helps sustain the economic viability of the air carriers in the event their employees go on strike under the circumstances triggering the Agreement.

ALPA's position is ill-conceived. An administrative agency cannot deny relief on the ground that the applicant should not have entered into a transaction requiring approval by the agency. If it is undesirable for the Board to accredit the Agreement for the reasons advanced by ALPA, the Board should be relieved of jurisdiction over such agreements and thereby free the agreements from regulation by the Board. Furthermore, it is not inappropriate for air carriers to seek economic strengthening through Board action. The provisions of section 102 of the Federal Aviation Act make it clear that the Board has this very role to perform in its administration of the Act.

Conflict of Interest

Since the air transportation business affects the public interest, the Six Unions consider it essential that the airlines not be placed in a conflict-of-interest situation. The

record indicates that, at the point a Carrier Party is confronted with the likelihood of a strike, the carrier takes into account the assistance it can anticipate pursuant to the Agreement in reaching its decision whether or not to submit to the strike. Apparently it is the Six Unions' position that the Agreement thereby creates a conflict of interest in the conduct of labor-management relations by inserting an incentive derogating from the public interest in the continued operation of airline service through the minimizing of labor strife and strikes. The Six Unions deem it unimportant that the payments under the Agreement constitute only a portion of a struck carrier's losses; they believe the basic consideration is that the public interest in avoiding a strike is determined within a different financial framework under the Agreement than without the Agreement.

These contentions are without merit. If the theory of the Six Unions were given play, any means of self-help employed by air carriers would present a conflict-of-interest problem. But the national labor policy, as exemplified in the Railway Labor Act, does not require air carriers to assent to union demands and avoid interruptions of service. It only requires that the air carriers, and the unions, bargain in good faith and observe the provisions of the Railway Labor Act. If they cannot reach agreement after exhaustion of the procedures of that Act, the carriers and the unions may have recourse to self-help, which includes mutual assistance such as that afforded by the Agreement. *Kennedy* v. *Long Island Railroad, supra.* And where, as the record here establishes, the Agreement does not pose a threat to the development of a stable and efficient air transportation system, but instead enhances the attainment of such a system, the Agreement is not adverse to the public interest.

Railway Labor Act

Multi-Carrier Bargaining

ALPA contends that the Agreement functions to interpose carriers other than the bargaining carrier into a pending dispute and thereby provides a means for the carriers to impose multi-carrier negotiations on the pilots without regard to Railway Labor Act procedures. ALPA maintains it has at all relevant times bargained with the carriers on a single-carrier basis and it cannot be forced to bargain on a multi-carrier basis.

It is true that under the Railway Labor Act joint bargaining cannot be required of either the employees or the employers. But the Agreement does not thrust such bargaining on ALPA. The Board has twice found allegations of compulsory joint bargaining wanting, 29 C.A.B. at 172 and 40 C.A.B. at 601-609, and the same contention was rejected by the court in the *Kennedy case*, 211 F.Supp. at 488.

Nor does the record developed in the instant proceeding support ALPA's contentions. ALPA relies on testimony of its witness that during concurrent negotiations with Eastern and United the pilots found the proposals of the two carriers were identical on some issues. This hardly demonstrates that the Agreement compels multi-carrier bargaining. First, it appears that the issues on which the positions of the carriers coincided were limited in number. Second, there is no showing that the concurrence of position on the part of the airlines was in any way attributable to the Agreement. Third, it is not unreasonable or unlawful for the airlines to take a common position on a common issue. As the Board said when it first approved carrier mutual aid (29 C.A.B. at 172):

> It may well be, of course, that carriers have and under the agreement increasingly will consult with each other concerning labor questions of common concern. Such a practice, however, would not necessarily entail any sacrifice of each carrier's complete and exclusive control over its collective bargaining.

In addition, the testimony of the ALPA witness indicates that the issues were resolved differently on the two airlines. Finally, the IAM, which had a policy of favoring joint bargaining,[26] has receded from that policy and, pursuant to an IAM Air Transport Committee Report passed at the 1968 convention, now negotiates on a separate but coordinated basis. It is evident, therefore, that the Agreement does not compel joint bargaining.

Application of Agreement to Individual Unions

ALPA asks that, in the event the Agreement should otherwise be approved, such approval be made inapplicable to the pilots. APA seeks principally to avoid approval of the Agreement with respect to American.

ALPA's request is bottomed on the fact that pilot collective bargaining is conducted individually with each carrier by a committee of line pilots in the service of the airline involved, with ALPA home office assistance. ALPA contends that inter-union mutual assistance does not exist, that the future ALPA carrier labor relations picture is favorable, that there have been only two ALPA strikes against Carrier Parties since 1958, that the carrier financial resources far exceed those of ALPA, that no strike benefits have been paid by the pilots since 1963, that no benefits are paid for

[26] The 1966 IAM negotiations were handled on a joint bargaining basis at the request of IAM.

the first 30 days of a strike, and that such benefits as are available to striking pilots would not be sufficient to have any influence on collective bargaining.

These contentions do not convince the Examiner that it would be adverse to the public interest or in violation of the Act to allow the Agreement to go into effect with respect to the pilots. The *Kennedy* case, *supra*, establishes that a mutual assistance arrangement among carriers does not violate the Railway Labor Act in a major dispute between an individual union and an individual carrier. Furthermore, as was discussed earlier, it is not properly within the Board's province to deal with the relative bargaining powers of employers and employees unless there were such an imbalance as to threaten the development of a stable and efficient air transportation system. The record does not demonstrate any such imbalance.[27] Accordingly, ALPA's request is denied.

APA's position arises from the fact that it represents pilots only on American. The reasons justifying denial of ALPA's request warrant the same action with respect to APA.

Conditions

Period of Approval

In the last mutual aid proceeding, the Examiner approved the Agreement without a time limit, but the Board restricted the approval to three years. The Board predicated its action on the ground that the years since creation of the

[27] Even if the allegations of ALPA accurately represent the facts, the factors are subject to change regardless of whether the Agreement should be approved. Thus, inter-union assistance could develop, pilots represented by ALPA could increase their resort to strikes in the future, pilot financial resources could grow, and ALPA policies with respect to strike benefits could alter.

Opinion

Agreement had not been typical for the industry, plagued with a capacity problem, or for labor-management relations, preoccupied with the crew complement issue.

The Bureau recommends that approval again be limited to a term of years, claiming that the same factors previously persuading the Board to place a time period on its approval are still outstanding. The Bureau asserts that the overcapacity problem has not been resolved and that the crew complement for the Boeing 737 and aircraft yet to be placed into service has not been settled. The Bureau suggests five years from July 1967 as a period consistent with the Board's prior temporary approval.

ALPA states that the pattern of improved labor relations between the parties can only be negatively affected by providing the carriers with indefinite assurance of the continuity of the Agreement.

The Six Unions, on the other hand, maintain that the Bureau's position avoids the problem. They urge that there will always be unique labor relations in the industry and that, if the impact of the Agreement in aggravating labor relations is sufficient to warrant its periodic reexamination, such reason also supports disapproval of the Agreement.

The Examiner does not believe temporary approval serves a useful purpose at this stage of the Agreement's existence. If throughout ten years of life for the Agreement industry conditions have not been typical and are not presently representative, it is likely that there is no such measure as a normal period for purposes of the Agreement. Moreover, after three proceedings, two of which have involved comprehensive evidentiary public hearings, it does not appear that there are any legal or factual issues of importance remaining for exploration.

Opinion

The basic principles applicable in evaluating the Agreement have been established. Nothing significantly new in the nature of the evidence has been developed over the years; only the details of the bargaining between employees and employers and the context in which strikes were called have differed to some extent. If, as ALPA contends, the crew complement issue has been resolved and pilot-carrier labor peace is the prognosis for the future, there is even less reason to approve the Agreement for a temporary period. In the judgment of the Examiner it would be an undue burden on the parties and inconsistent with the proper dispatch of the Board's business to require the parties to participate in another proceeding at a prescribed time in the future.

Approval for an indefinite period does not mean that the Board would be powerless if circumstances should arise which call for reexamination of the Agreement. Section 412 of the Federal Aviation Act expressly authorizes the Board to disapprove agreements "whether or not previously approved by it" if the Board finds the Agreement to be adverse to the public interest or in violation of the Act. Accordingly, if justified by future events, the Board can take appropriate action.

Other Conditions

The prior approval by the Board was subject to several conditions none of which were in controversy in the instant proceeding. There are no changed circumstances which warrant modifying or omitting the conditions. Indeed, some of the conditions are necessary to aid the Board in keeping reasonable surveillance over the Agreement to ascertain whether action by the Board in regard to the Agreement may be required. Accordingly, all the conditions will be imposed again.

Opinion

Ultimate Findings

On the basis of the foregoing facts and considerations and all of the evidence of record,[25] it is found that the Mutual Aid Agreement is not adverse to the public interest or in violation of the Federal Aviation Act of 1958, as amended, and should be approved, subject to the following conditions:

1. The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;

2. The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

3. In accounting for the amounts due to others and the amounts due from others under the Agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the Agreement as may be reasonably required by the Director of the Board's Bureau of Operating Rights; and

4. Copies of all arbitrators' decisions and awards issued under this Agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

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[25] Contentions of the parties not discussed herein have been considered by the Examiner and do not alter the decision.

Appendix A

MUTUAL AID AGREEMENT, AS AMENDED

WITNESSETH:

WHEREAS, the parties are common carriers holding certificates of public convenience and necessity issued by the Civil Aeronautics Board (hereinafter called CAB) providing for the transportation by air of persons, property and mail; and

WHEREAS, the mutual interests of the parties call for the taking of all proper and lawful measures to bring about sound and reasonable economic conditions that will be of benefit to the air transport industry and to the public; and

WHEREAS, the parties and other airlines are facing or faced with the threat of extreme and unreasonable demands made by representatives of certain of the classes and crafts of their employees, as exemplified by the current dispute between certain of the parties and their maintenance and related employees, represented for the purpose of collective bargaining by the International Association of Machinists, AFL/CIO (hereinafter called IAM), a controversy in which IAM has rejected and shown an utter disregard for the recommendations of the Emergency Board 122 appointed by the President of the United States to investigate said dispute and has struck Capital Airlines and threatened to strike other carriers for their insistence upon substantial compliance with the terms of said recommendations, which action of the IAM tends to undermine the influence, position and integrity of such Board and is destructive of the collective bargaining process; and

Opinion

WHEREAS, it is in the public interest and the interest of the parties hereto that the recommendations of such Presidential Emergency Board created under the provisions of the Railway Labor Act be respected by the employers and employees whose dispute was heard by the Board;*

NOW, THEREFORE, the undersigned hereby agree:

1. (A) In the event any party suffers a strike, resulting in the shutdown of its flight operations, (i) which has been called for reasons which include the enforcement of demands in excess of or opposed to the recommendations of a board established by the President of the United States under section 10 of the Railway Labor Act and applicable to such party; or (ii) which has been called in the absence of the establishment of such a board or in case of the failure of such a board to make specific recommendations on the merits for the settlement of the issues in dispute, and the struck party has in all respects acted in compliance with the Railway Labor Act; or (iii) which has been called before the employees on strike shall have exhausted the procedures of the Railway Labor Act; or (iv) which is otherwise unlawful; then, in such event, each party will pay over to the party suffering the strike an amount equal to its increased revenues attributable to the strike during the term thereof, less applicable added direct expenses.

(B) A struck party (subject to the limitations prescribed below) shall be entitled to additional payments if the payments received under (A) are less than twenty-five percent of its normal air transport operating expenses for the flight operations shut down as a result of the strike (the

* This clause and the preceding clauses were in the original agreement dated October 20, 1958, and they have not been altered by subsequent amendments to the agreement.

excluding added direct expenses applicable to increased revenues attributable to a strike as described in (A) above. A month in which a party's normal operations have for any reason been curtailed to an extent that substantially affects its air transport operating expenses shall not be regarded as a month of full operations.

(2) A party's air transport operating revenue shall include all payments such party has received under the Agreement, but shall not include the increased revenues attributable to any strike with respect to which such party shall have made payments under the Agreement.

(E) In the event of a dispute regarding the requirement to make or the right to receive payment, the dispute shall be referred to final and binding arbitration. Unless the parties involved otherwise agree within twenty days after receipt of the notice and demand for arbitration, the arbitrator shall be selected and the arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Judgment upon any award rendered hereunder may be entered in any court having jurisdiction.

2. Any other trunk air carrier holding a certificate of public convenience and necessity issued by the CAB may become a party to the Agreement by signing counterpart copies and forwarding such copies to each of the other parties and to the CAB for filing. Any such carrier which elects to become a party after March 15, 1962, however, shall be liable for all payments it would have had to make if it had been a party on and after January 1, 1962, less all payments

which it would have been entitled to receive with respect to such period, and the payments by other parties under Clause 1(B) above shall be recomputed accordingly; provided, however, that any such carrier that was not a party to this agreement at any time prior to January 1, 1962 may elect to become a party as provided above, or upon giving six months' notice to the other parties to the agreement and the Civil Aeronautics Board of its desire to become a party at the end of said six months, in which event no payments will be due to or from such joining carrier until the end of said six months, and it signs counterpart copies of this agreement for all the parties and files it with the Civil Aeronautics Board.

Other than as set-off against its liability upon becoming a party as stated above, such carrier shall not be entitled to payments which it would have received had it been a party to the Agreement.

3. This Agreement shall become effective immediately, shall be filed with the CAB, and shall continue in effect until December 31, 1962 and thereafter from year to year, but any party may withdraw effective as of December 31, 1962 or December 31 of any year thereafter by giving at least sixty days' written notice to the other parties and the CAB. Upon such withdrawal by any party, any other party may also withdraw effective as of December 31 of the same year by giving at least thirty days' written notice to the other parties and the CAB. A party that withdraws from the Agreement (at a time two or more other carriers continue) shall nevertheless thereafter remain obligated, for a period of twelve months following the month in which such withdrawal becomes effective, to make the payments required by the Agreement to the extent that such withdrawing

party, on or after January 1, 1962, has received the amounts under Clause 1(B) above in excess of payments made by such party under such Clause 1(B).

This amendment shall become effective immediately and shall be filed with the CAB. If this amendment shall be disapproved by the CAB, it shall terminate forthwith to the extent disapproved and payments made hereunder, to the extent that they are affected by the terms of such disapproval, shall become and be treated as obligations owing from the receiving party to the paying party.

Any party may withdraw from the Agreement in the event the CAB disapproves the Agreement in whole or in part, by so notifying each of the other parties and the CAB, within ten days after such disapproval.

Withdrawal under the preceding paragraph shall be subject to the conditions prescribed in the final sentence of Clause 3 of the Agreement.

IN WITNESS WHEREOF, the parties have signed this agreement as of the date first above written.

AMERICAN AIRLINES, INC.
BRANIFF AIRWAYS, INC.
EASTERN AIR LINES, INC.
NORTHWEST AIRLINES, INC.
PAN AMERICAN WORLD AIRWAYS, INC.
TRANS WORLD AIRLINES, INC.
UNITED AIR LINES, INC.

APPENDIX I

(a) Assume maximum amount payable under (B) is $10,000,000 because of limitation contained in paragraph (2).

(b) Assume one struck carrier receives virtually all of standard amount from payments under (A).

(000 omitted)

Carrier	Standard Amount	Payments Under (A)	Additional Payments Under (B)	Total of (A) and (B) Amount	Total of (A) and (B) % of Standard Amount	Additional Payments as Redistributed	Revised Total of (A) and (B) Amount	Revised Total of (A) and (B) % of Standard Amount
A	$ 5,000	$ 4,800	$ 200	$ 5,000	100%	–0–	$ 4,800	96 %
B	6,000	4,000	2,000	6,000	100%	$ 1,368	5,368	89.5%
C	3,000	2,000	1,000	3,000	100%	684	2,684	89.5%
D	10,000	1,000	6,800*	7,800	78%	7,948	8,948	89.5%
Total	$24,000	$11,800	$10,000	$21,800		$10,000	$21,800	

* Maximum amount payable under paragraph (2) is exhausted.

amount produced by such twenty-five percent being hereinafter called the "standard amount"), such additional payments to be determined as follows:

(1) In the event the payments to a struck party under (A) shall be less than the standard amount, the other parties (whether or not they are obligated to make payments under (A)) shall make such additional payments to the struck party as may be necessary to bring the aggregate of the payments under (A) and (B) up to the standard amount, subject to the limitations contained in paragraphs (2) and (3) below.

(2) The additional payments required of each party under paragraph (1) above shall be in the proportion that such party's air transport operating revenue for the calendar year next prior to the year in which the strike occurs bears to the total of such revenue for all paying carriers, but no party shall be obligated to make additional payments with respect to any calendar year which exceed, in the aggregate, one-half of one percent of such party's air transport operating revenue for such prior calendar year.

(3) In any calendar year in which there are two or more struck parties entitled to payments under (B) and the limitation contained in paragraph (2) shall prevent any of such struck parties from receiving the standard amount, the aggregate amount of all additional payments for such year under (B) shall be redistributed between the struck parties on the basis described below. There shall be no redistribution of payments under (A).

Opinion

The redistribution of additional payments under (B) shall be with the object that, to the extent possible, no one of the struck parties shall receive from the total of payments under (A) and (B) a lower percentage of the standard amount than is received by any of the other struck parties except when a lower percentage of the standard amount results from the principle that there will be no redistribution of payments under (A).

An example of redistribution of payments under (B) is set forth in Appendix I attached hereto.

(4) The redistribution referred to in paragraph (3) shall be made promptly from time to time whenever it appears that a party which has already received payments under (B) will attain a higher percentage of the standard amount than it will be entitled to thereunder.

(C) All strike payments shall be made monthly within ten days after the close of each calendar month, or at such more frequent intervals as may be agreed to by the parties, upon the basis of preliminary estimates subject to subsequent adjustment.

(D) For the purposes of the Agreement:

(1) A struck party's normal air transport operating expenses for each day for any operation shall be its average daily air transport operating expenses for such operation includable in Accounts 5100-7000 under the CAB's Uniform System of Accounts and Reports for twelve months of full operations immediately preceding the month in which the strike shall have started,

Appendix E

SIX UNIONS' LIST OF STRIKES INVOLVING PARTIES TO THE MUTUAL AID AGREEMENT

Carrier	Year	Number of Days on Strike
TWA	1958	16
Eastern	1958	38
Eastern	1958	22
American	1958	22
Continental	1960	105*
Eastern	1960	11
Braniff	1960	10
Pan American	1960	1
Northwest	1960	137
American	1961	7*
TWA	1961	7*
Eastern	1961	7*
National	1961	7*
Pan American	1961	7*
National	1961	6
Eastern	1962	82*
Pan American	1962	1
United	1963	1
National	1964	1
Pan American	1964	1
Pan American	1965	10
Eastern	1966	43
National	1966	43
Northwest	1966	43
TWA	1966	43
United	1966	43

* Attributed by the Six Unions to crew complement controversy. See comments, Initial Decision, p. 26, n. 19.
Source: Initial Brief of the Six Unions, pp. 18-19.

APPENDIX C

Airlines Mutual Aid Pact-Order Granting in Part Petition for Reconsideration and Remanding for Further Hearing

Order 70-11-110 (November 23, 1970)

Opinion

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C. on
the 23rd day of November, 1970

Docket 9977
(70-11-110)
Agreement CAB 21445

AIRLINES MUTUAL AID PACT

ORDER GRANTING IN PART PETITION FOR RECONSIDERATION AND REMANDING FOR FURTHER HEARING

In Order 70-7-114 dated July 23, 1970, the Board approved the Mutual Aid Agreement in the form considered by the examiner. In addition, it approved an amended agreement which was entered into on October 31, 1969, subsequent to the issuance of the initial decision, and filed with the Board on February 5, 1970.

The Six Union Parties[1] have filed a petition for reconsideration and the Carrier Parties[2] have filed an answer.

The Six Union Parties request the Board to reconsider Order 70-7-114 and upon such reconsideration to (1) re-

[1] The Air Line Dispatchers Association, the Brotherhood of Railway and Steamship Clerks, the Communication Workers of America, the Flight Engineers International Association of Machinists and Aerospace Workers, and the Transport Workers Union of America.

[2] The original seven carrier parties to the proceeding are American Airlines, Braniff Airways, Eastern Air Lines, Northwest Airlines, Pan American World Airways, Trans World Airlines, and United Air Lines. Pursuant to amendments to the Agreement adopted as of October 31, 1969, Continental Air Lines, National Airlines, and Western Air Lines have joined.

open the proceeding to take evidence on the amended agreement or (2) disapprove the amended agreement. *Inter alia*, they assert that the substantial amendments made to the agreement[3] following the close of the evidentiary hearing and the coincidence of two subsequent labor disputes involving National and Northwest raise serious problems with respect to the relationship between the amended agreement and its impact upon the stability of labor relations in the air transport industry.

The Carrier Parties contend, *inter alia*, that the Board is not required to hold a hearing in light of the extensive evidentiary proceedings in the past on this type of agreement, that the recent amendments do not alter the agreement in material respects, and that no facts are alleged to show that the existence of the amended agreement resulted in consequences contrary to the public interest in connection with the aforementioned two strikes.

We are not presently persuaded that our earlier determination was in error. However, in fairness to the parties and to ourselves, we believe that we should reserve making a final judgment in this important matter until we have before us a fully developed record on the current facts, with all parties afforded an opportunity to present their evidence and arguments and to be fairly judged on that evidence and these arguments. See, *e.g.*, *Retail Stores Employees Union*,

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[3] The amendments increased the level of supplemental payments (over and above the "windfall" payments) from 25 percent of normal operating expenses for operations shut down by a strike to 50 percent of such carrier's expense during the first two weeks of the strike, 45 percent for the third week, 40 percent for the fourth week, and 35 percent for any period thereafter. The amended agreement also increased the annual maximum liability of any carrier for supplemental payments from one-half to one percent of its air transport operating revenue for the previous calendar year. In addition, the new agreement eased the conditions of entry to permit any trunk carrier to join the agreement by November 15, 1969, without a waiting period or back payment.

Appendix B

CARRIER PARTIES

1966 TOTAL AND MILITARY CONTRACT REVENUES

(000)

Carrier	Total	Military Contract	Pctge.
American	$ 727,712	$ 1,833	.3
Braniff	187,827	14,093	7.5
Eastern	500,989	—*	—
Northwest	311,319	37,259	12.0
Pan American	840,967	79,959	7.5
TWA	681,632	20,911	3.1
United	856,903	12,653	1.5
Total	$4,107,349	$166,708	4.1

* In 1967, Eastern had $7,044,000 in military contract revenues.

Source: Total Revenues, Six Unions Joint Rebuttal Exhibit No. 12; Military Contract Revenues, ALPA Exhibit 11.

Appendix C

STRIKES AGAINST PARTIES TO AGREEMENT

Carrier	Period	Flight Operations Halted (Days)
Capital	10-17 to 11-22-58	37
TWA	11-21 to 12- 7-58	16
Eastern	11-24-58 to 1- 1-59*	38
Eastern	11-24 to 12-15-58**	22
American	12-20-58 to 1-10-59	22
Continental	6-29 to 10-10-60	105
Eastern	6-11 to 6-22-60	11
Braniff	9-25 to 10- 5-60	10
Pan American	10- 1 to 10- 2-60	1
Northwest	10-11-60 to 2-24-61	137
American	2-18 to 2-24-61	7
TWA	2-18 to 2-24-61	7
Eastern	2-18 to 2-24-61	7
National	2-18 to 2-24-61	7
Pan American	2-18 to 2-24-67	7
National	5- 2 to 5- 7-61	6
Eastern	6-23 to 9-13-62	82
Pan American	6-23 to 6-24-62	1
United	8-20 to 8-21-63	1
Pan American	8-25 to 8-26-64	1
Pan American	3-31 to 4-10-65	10
Eastern	7- 8 to 8-19-66	43
Northwest	7- 8 to 8-19-66	43
TWA	7- 8 to 8-19-66	43
United	7- 8 to 8-19-66	43
		707

* FEIA.
** IAM.
Source: Carrier Exhibit No. 20.

Appendix D

STRIKES AGAINST CARRIERS NOT PARTY TO AGREEMENT SINCE INCEPTION OF AGREEMENT

Carrier	Period	Flight Operations Halted (Days)
West Coast	11-21 to 11-23-58	3
Lake Central	11-23 to 12- 5-58	13
Pacific	6- 5 to 6- 8-59	3
Southern	8- 1-59 to 6-30-61	65*
Flying Tiger	1-31 to 2-16-60	27
Mohawk	3-17 to 4- 3-60	18
Southern	6- 5-60 to 9- -62	117**
Flying Tiger	2-18 to 2-24-61	7
Western	2-18 to 5-11-61	82
Pacific	4-23-62	***
National	2-15 to 2-16-64	1
BOAC	11-27-64 to 1- 7-65	42
Trans Caribbean	12- 9 to 12-11-64	3
San Francisco & Oakland Helicopter	4- 3 to 4-11-66	8
National	7- 8 to 8-19-66	43
Pacific	11- 6 to 11-13-66	8
Mohawk	12- 9-66 to 1-30-67	54
West Coast	7- 3 to 7-10-67	8
Airlift	3- 1 to 3-24-67	24
Qantas	12- 8-67 to 2-18-68	60
		586

* Full operations resumed 10-5-59.

** Full operations resumed 9-30-60.

*** Four hours.

Source: Carrier Exhibit No. 20.

Opinion

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket 9977
(73-2-110)

AIRLINES MUTUAL AID AGREEMENT

Agreement CAB 21445, as amended

Decided: February 27, 1973

The Mutual Aid Agreement, as amended, is found not to be adverse to the public interest or in violation of the Act, and is approved, for a period of five years, subject to conditions.

APPEARANCES:

CHARLES MILLER, RUSSELL CARPENTER and ROBERT SAYLER for American Airlines, Inc.; Braniff Airways, Inc.; Continental Air Lines, Inc.; Eastern Air Lines, Inc.; National Airlines, Inc.; Northwest Airlines, Inc.; Pan American World Airways, Inc.; Trans World Airlines, Inc.; United Air Lines, Inc.; and Western Air Lines, Inc.

RAYMOND J. RASENBERGER and WARREN C. NIGHSWANDER for Hughes Air Corp. d/b/a Air West; Frontier Airlines, Inc.; Mohawk Airlines, Inc.; North Central Airlines, Inc.; Ozark Air Lines, Inc.; Piedmont Aviation, Inc.; and Texas International Airlines, Inc.

JAMES L. HIGHSAW, JR. and WILLIAM G. MAHONEY for Air Line Dispatchers Association; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes; Communication Workers

America; Flight Engineers International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America.

ROBERT S. SAVELSON for Air Line Pilots Association, International.

MARTIN SEHAM and FRED C. KLEIN for the Aircraft Mechanics Fraternal Association, Locals 24 and 32, and the Allied Pilots Association.

WILLIAM A. KUTZKE for the Department of Transportation.

NATHANIEL B. BREED, JR., and ALEXANDER N. ARGERAKIS for the Bureau of Operating Rights, Civil Aeronautics Board.

Opinion

BY THE BOARD:

In this proceeding we are once again considering the Airlines Mutual Aid Agreement, and particularly certain amendments, effective October 1969 and January 1971, which provide respectively for increased guaranteed payments to struck carriers and participation of the local service carriers.

The Mutual Aid Agreement was first instituted by six trunkline carriers in October 1958, and was approved by the Board for a one-year period.[1] It provided solely for so-called "windfall" payments by participating carriers to a carrier suffering a strike. Payments were authorized only for strikes in support of union demands in excess of the recommendations of a Presidential Emergency Board ap-

[1] Six-Carrier Mutual Aid Pact, 29 CAB 168 (1959).

pointed under the Railway Labor Act, which were called before union exhaustion of the Railway Labor Act prestrike procedures, or which were otherwise unlawful. The "windfall" payments constituted payments equivalent to the increased revenues of non-struck carrier parties that were attributable to the strike, less any added direct expenses. The Board found that although the Agreement would increase management's abilities to withstand the economic impact of a strike, there was no basis for any inference that the agreement would constitute an impediment to *bona fide* collective bargaining, or would interfere with the prompt settlement of disputes.

In 1962 the trunkline carriers (now eight), amended their agreement to provide for a guaranteed minimum payment to a struck carrier in the form of "supplemental" payments which, together with the windfall payments, would provide the struck carrier with a recovery equivalent to 25% of its normal operating expenses. The maximum contribution to "supplemental" payments by any participating carrier was limited to ½ of 1% of the carrier's operating revenues for the prior calendar year. In addition, the coverage of the Agreement was extended to strikes called in the absence of appointment of a Presidential Emergency Board, or where the Report of the Emergency Board failed to make recommendations on the merits of the dispute, provided the struck carrier had in all respects acted in compliance with the Railway Labor Act. In approving the amended Agreement in 1964,[2] following an evidentiary hearing, the Board found that the Agreement offered, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, and thereby contributed to industry stability in an industry particularly vulnerable to, and plagued by, strikes.

[2] Mutual Aid Pact Investigation, 40 CAB 559 (1964).

Opinion

The present proceedings initially sought approval of the renewal of the 1962 Agreement, as approved by the Board in 1964. However, in October 1969, following hearing and the Administrative Law Judge's approval of the renewal, the trunkline carriers amended their agreement in two major respects, as follows:

> 1. The level of "supplemental" payments to a struck carrier was increased from 25% to a 35-50% sliding scale (50% for the first two weeks, then decreasing 5% weekly to 35% in the fifth week) of the struck carrier's "normal air transport operating expenses."
> 2. The maximum annual obligation of a participating carrier to contribute to supplemental payments to a struck carrier was increased from ½ to 1% of the paying carrier's air transport operating revenues in the preceding calendar year.[3]

By Order 70-7-114, July 23, 1970, the Board, without further evidentiary proceedings, approved the Mutual Aid Agreement as it had been amended by the October 1969 amendments. The Board agreed with the Administrative Law Judge that the Agreement was fully consistent with national labor policy; that the developments since the prior proceeding further supported the contribution of the Agree-

[3] Other amendments, which are not disputed by the parties, provide for modified entry requirements which permitted new parties, or trunkline carriers previously parties to the Agreement, to become parties by November 15, 1969, without any requirements for back payments or a waiting period (as a consequence of this amendment, Continental and National rejoined the Agreement effective November 15, 1969, and Western became a party as of October 3, 1970); stricter withdrawal procedures requiring that the parties give a one year's written notice of intent to withdraw from the Agreement; and revision of the arbitration procedures to cover disputes involving amounts due or owing under the Agreement.

et al. v. *F.C.C.*, U.S. App. D.C. , F. 2d , (No. 22,605, October 27, 1970) (Slip opinion at 11). Accordingly, we will remand the matter for the taking of further evidence with respect to the amended agreement on events which occurred since the close of the earlier hearing.[4]

ACCORDINGLY, IT IS ORDERED THAT:

1. Order 70-7-114 dated July 23, 1970, is vacated to the extent that it approved the amended agreement.

2. This proceeding be and it hereby is remanded to the examiner for further evidentiary hearing in accordance with the views expressed herein.

3. Except to the extent granted herein, the petition for reconsideration of the Six Union Parties is hereby denied.

By the Civil Aeronautics Board:

HARRY J. ZINK
Secretary

(SEAL)

[4] *Inter alia*, the Board desires evidence as to the agreement's role, if any, in affecting the bargaining balance between labor and management in the air transportation industry. In addition, in the event that we reach a different ultimate conclusion on the merits of the amended agreement, we will nevertheless give consideration to whether our action should be prospective only.

Opinion

MEMBERS MINETTI AND MURPHY CONCURRING:

We concur in the remand for the reasons set forth in our dissent to Order 70-7-114 as well as the additional matters subsequently raised by the petitioners.

Vice Chairman Gillilland Filed the Attached Concurrence.

GILLILLAND, VICE CHAIRMAN, CONCURRING:

As pertaining to the reasons stated by the Board for its decision, which, in a sense became the law of the case, the Union Parties have, I believe, the better of it on their requests for remand. Accordingly, I vote to remand.

However, there is another and to me more persuasive reason for not overturning the agreement than those stated. It appears to be clearly established that strike insurance is not *per se* unlawful. Furthermore, it is readily acknowledged that if the insurers were other than air carriers the Board would have no jurisdiction. It follows that if the carriers had chosen to make similar agreements with U. S. Steel or the Great Atlantic and Pacific Tea Company the matter would be beyond the reach of the Board. Consequently it seems to me that the mere fact the carriers have found that they can make a better contract by insuring each other, and have chosen to do so, is no more than a circumstance not justifying the Board's intrusion.

Although I am aware of the precedents and have participated in some of the earlier cases, I am inclined to regard this as one of the Board's gratuitous time consuming involvements, tending to confuse but not dispose, and from which, for the good of everybody, it should be drawing away.

APPENDIX D

Airlines Mutual Aid Agreement

Order 73-2-110 (February 27, 1973)

Opinion of the Board

Opinion of Members Minetti and Murphy, Concurring and Dissenting

Initial Decision of Examiner Arthur S. Present (1972)

oral argument heard. Accordingly, the case is ready for decision.

Upon consideration of the record and the contentions of the parties, we find that we must confirm our original view, expressed in Order 70-7-114, that the various amendments do not so change the basic nature of the Agreement as to make the amended Agreement, unlike its predecessor, adverse to the public interest. We find no evidence of record to persuade us that our original reasons are invalid. Thus we cannot agree with the conclusion of the Administrative Law Judge that the respective amendments should be disapproved. We have also concluded that, subject to a condition which will insure that mutual aid payments will not increase subsidy, local service carriers should be permitted to participate in the Agreement. Accordingly, we find that the Agreement as amended by the amendments of October, 1969 and December, 1970 should be approved, subject to conditions. We will, nevertheless, limit our approval to a period of five years.

Judge Present found that the Mutual Aid Agreement, in the absence of the increases in the supplemental payments effectuated by the 1969 amendments, and without participation by the local service carriers, would not be adverse to the public interest or in violation of the Act, and should be approved. He further found that the record "does not establish that any carrier has incurred or prolonged a strike because of the increased level of mutual aid. Nor does it demonstrate that the viability of any carrier has been critically threatened because of the higher level of contributions required under the amended Agreement." [6] Thus, Judge Present found no direct showing on the reopened record that the amended Agreement, limited as indicated,

[6] I.D. 25, 31-32, 41.

has operated in a manner inconsistent with the public interest, and we agree. We therefore adopt as our own the findings and conclusions of Judge Present in his Initial Decision, attached hereto as an Appendix, except as modified by, or inconsistent with, the views expressed herein.

I.

The Administrative Law Judge found that there were many significant pressures upon a carrier to settle a strike and hence there was no likelihood that a carrier receiving mutual aid payments would prolong a strike indefinitely. However, he saw a potential danger that the 1969 amendments which increased the supplemental payments might encourage a carrier party to the Agreement, particularly a weak airline, to prolong a strike for the short-term benefits of the increased payments. Thus, the increases, in his view, would be adverse to the public interest.

Although, as Judge Present noted, the record fails to demonstrate that the increased payments have in fact had any significant effect on labor-management negotiations, it must be recognized that the increases in supplemental payments were specifically intended to enhance airline management's ability to resist the economic pressures of a strike. It would be naive to assume that management, in its negotiations with labor, would totally ignore the financial cushion that the increased level of mutual aid payments provide.

However, in our view, the appropriate question is not whether a strike might be terminated in some cases more rapidly if increased mutual aid payments were not available. Rather, it is whether the mutual aid payments so shift the bargaining balance in favor of carriers as to create a serious likelihood that a carrier might resist settlement of

a strike on a reasonable basis in circumstances where such a settlement was possible. We are unable to conclude that the Mutual Aid Agreement, either in its original form, or as amended to provide for the increased level of supplemental payments, has altered the negotiating balance between airline management and airline employees in any manner which would be inconsistent with the public interest. Nor can we conclude that the mutual aid payments, of themselves, could become a significant factor in prolonging a strike that otherwise was capable of settlement on a reasonable basis.

The evidence is persuasive that the amended Mutual Aid Agreement has not resulted in any unwarranted shift in the negotiating balance in favor of airline management. In the first place, the expert testimony of record demonstrates,[7] and we agree, that the nature of the air transport product is such that the position of management in labor negotiations in the air carrier industry is somewhat weaker than managements in other types of industries, by reason of the greater impact of a strike on air carriers. The air transport industry, as a service industry, differs from industries such as manufacturing in that the commodity it sells is perishable. Air transport service cannot be stored, like manufactured goods, in contemplation of a strike. Once the plane door closes on empty available seats, that commodity is lost. The air transportation industry, even more than other transportation industries, is subject to this phenomenon because of its heavy dependence upon passenger transport, which is almost totally incapable of stockpiling.

In addition, the evidence with respect to wage settlements in the airline industry demonstrates that the employees retain substantial and effective bargaining power regardless

[7] TCE 80, pp. 11-12.

of the Mutual Aid Agreement. Thus, the record shows that air carrier wages, both average for all employees, and average for ground (rank and file) employees, are higher than, and increases have increased faster than, wages in other industries, including other transportation industries.[8] For the period 1967-1970, airline employment costs increased by some 33%, while the consumer price index increased only some 17%.[9] Furthermore, although in the 1960's increased airline employment costs were more than offset by increases in airline employee productivity, commencing in 1968, wage increases have outstripped increases in employee productivity by a substantial margin. For example, in 1970 employment costs increased some 13.3%, while employee productivity increased only some 2.3%.[10]

Indeed, this 13.3% increase in employment costs in 1970 (during which the increased level of mutual aid payments was first in effect) surpassed the 8.3%, 6.8%, and 9.1% increases in the prior three years 1967, 1968, and 1969, respectively. These facts do not show that the increased level of payments deprived employees of effective bargaining power.

We recognize that the increased payments are specifically designed to, and indeed may well increase a carrier's willingness or ability to resist union demands which the carrier considers to be unreasonable. However, it does not follow that the Agreement thereby becomes adverse to the public interest. The pressures upon a carrier to settle a strike, despite the increased mutual aid payments, are so great that we perceive little danger that a carrier could be significantly influenced, by reason of such payments alone,

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[8] TCE 41, 41a, 42.

[9] TCE 41a, 44, 45.

[10] TCE 46, 47 (p. 4).

ment to airline stability; that the evidence established that the Agreement had had little, if any, impact upon labor management relations; and that the evidence did not show that the Pact had had any material effect upon the collective bargaining process. Specifically with respect to the October, 1969 amendments, the Board concluded that, "while the recent amendments strengthen the Agreement, they do not change its basic nature or add any new element which suggests that it, unlike its predecessor, is adverse to the public interest." The Board noted that it was unable to conclude that the agreement, as amended, would induce strikes or exacerbate labor-management relations, or create an imbalance in the collective bargaining process so as to pose a threat to the attainment of the public interest objectives of the Act. The amended Agreement, the Board found, was consistent with national labor policy and violates neither the Federal Aviation Act nor the Railway Labor Act. The favorable aspects of the Agreement in making a specific contribution to airline stability under conditions of increased cost pressures and declining earnings and profit margins, and in providing at a not unreasonable cost a substantial measure of relief against the costs of strikes, would override any detriments that might arise from the greater recoupment by the airlines of strike losses. The Board recognized that the amendments would provide substantially greater recoupment of strike losses, particularly in the case of short strikes when maximum benefits were provided. However, in this connection the Board stated:

> "It hardly seems reasonable to believe that a carrier will risk a strike on speculation that the strike will be short and that the carrier will realize the maximum benefits. Carriers must, under the new Agreement, as under the old, face the prospect that in all

> probability mutual aid will not meet their strike losses. Finally, the possibility of permanent diversion of traffic to competing carriers will serve as a positive incentive for carriers to avoid strikes."

On reconsideration, the Board, by Order 70-11-110, November 23, 1970, vacated its prior Order to the extent it approved the amended Agreement, and remanded the proceeding for the taking of further evidence with respect to the amended Agreement on events which had occurred since the close of the earlier hearing. These events included not only the amendments, but also the impact of two subsequent labor disputes. In reaching this determination, the Board stated:

> "We are not presently persuaded that our earlier determination was in error. However, in fairness to the parties and to ourselves, we believe that we should reserve making a final judgment in this important matter until we have before us a fully developed record on the current facts, with all parties afforded an opportunity to present their evidence and arguments and to be fairly judged on that evidence and those arguments."

Following the Board's remand, the carriers, on December 10, 1970 adopted an additional amendment, effective January 1, 1971, to permit entry and participation in the Agreement by local service carriers.[4]

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[4] In Order 70-7-114, the Board rejected the requests of Mohawk and North Central to withhold approval of the Mutual Aid Agreement until provision was made for participation of the local service carriers. The Board noted, nevertheless, that such participation was a matter which might well be considered by the two segments of the industry, and its decision denying this request was without prejudice to any future agreement of such a nature which might be filed.

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In his Initial Decision in the remanded proceeding, Administrative Law Judge Arthur S. Present concluded that the principal 1969 amendments to the Mutual Aid Agreement, providing for an increase in the supplemental payments from 25% to 35-50%, and an increase in the maximum of supplemental payment contributions from ½% to 1% of the participating carriers' air transport operating revenues in the preceding calendar year, should be disapproved. In addition, he concluded that the December 1970 amendment providing for participation of the local service carriers should likewise be disapproved. The disapprovals were, nevertheless, to run prospectively only. On the other hand, Judge Present found that the Agreement, in the absence of applicability of the disapproved amendments, would not be adverse to the public interest or in violation of the Federal Aviation Act, and should be approved for an indefinite period, subject to conditions.

By Order 72-4-59, the Board exercised discretionary review. Exceptions to the Administrative Law Judge's disapproval of the amendments to the Agreement were filed by the trunkline carrier parties to the Agreement, the local service carrier parties, and the Bureau of Operating Rights. (The Bureau also proposes that approval should be limited to five years.) ALPA and Six Union Parties (jointly) (ALDA, BRAC, FEIA, IAMAW, TWU and CWA) filed exceptions to Judge Present's decision insofar as he approved the Mutual Aid Agreement. Briefs have been filed[5] and

[5] Briefs to the Board were filed by the trunkline carriers, the local service carriers, ALPA, the Six Union Parties, and the Bureau. ALPA and Airline Mechanics Fraternal Association adopted their joint brief to the Administrative Law Judge as their brief to the Board. Allegheny Airlines filed a statement of position stating its belief that membership in the Agreement should be open to all certificated carriers, and that its decision not to join should not be construed as opposition.

54% of its total strike losses. Similarly, the $2.5 million mutual aid payments represented only 33.4% of TWA's total strike-cause losses ($7.3 million, including $5.7 million post-strike losses).[13] Hence, in our judgment, the so-called short-term "benefits" of mutual aid fall far short of real profits. Losses from strikes despite mutual aid payments remain substantial and continue to exert tremendous economic pressure on the carrier's side of the bargaining table.

The union parties argue that there is a cause and effect relationship between the increased supplemental payments and the length of the National, Northwest and Mohawk strikes, during which carrier managements received the amended higher level of supplemental payments. However, the record reveals no such relationship. In the National strike the carrier accepted the National Mediation Board proffer of arbitration prior to commencement of the strike, but such proffer of arbitration was rejected by the union (TCE-22, pp. 1-2, Attachments 1, 2). In the Northwest

[13] TCE-53. The initial decision (p. 17) and ALPA's brief (p. 22) make reference to an alleged 29.2% level of normal operating expenses during the course of a strike shutdown. This figure is apparently taken from Jt. Exh. 191, p. 2, in the original renewal proceeding, wherein Northwest projected expenses for a complete shutdown based on its expense reduction in a partial shutdown of ⅓ of its operations (Jt. Exh. 153). The projection was stated to be based on certain assumptions, and excluded the higher proportional expenses in the first weeks of a strike. A more accurate picture would appear to be based on the carriers' exhibits reflecting actual expenses incurred during six strikes where there were total strike shutdowns (Jt. Exhs. 152, 154). The level of expenses during these six strikes ranged from 23% to 56% of normal operating expenses, with an average for the total of the six of approximately 36%. These exhibits also reflect the higher level of expenses for strikes of shorter duration. While the declining 50% to 35% scale of guaranteed mutual aid payments would appear to be slightly in excess of the level of operating expenses during a total shutdown reflected by these 1958-1961 figures, the excess would appear to be substantially less than the inevitable post-strike losses, and hence does not appear to be unreasonable.

strike the union rejected arbitration while the company had the arbitration proffer under consideration (TCE-23, p. 3, Attachment 4). In the Mohawk strike the carrier accepted arbitration as to most of the issues. The union initially rejected the proposed arbitration, although it later consented to arbitration provided that all issues were submitted. Prior to the strike, the Mediator noted that the union's unwillingness to concentrate on reaching accord on the principal economic matters before trying to conclude agreement as to unresolved working conditions constituted an impediment in the mediation proceedings (Exh. MO-201, p. 2, 37; MO-C, p. 3).

The unions also vigorously argue that the Agreement creates an incentive for a member carrier to refuse to bargain in good faith as required pursuant to the Railway Labor Act, relying instead on the Mutual Aid Agreement payments to support it during the course of the strike. We find no merit in this argument.[14] We have already discussed the serious impact of a strike upon a carrier, despite the Mutual Aid payments. Moreover, there is no evidence in the record which would support the unions' contention. Rather, the record is replete with evidence of the earnest and consistent good faith efforts of National, Northwest and

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[14] Nor can we find any merit to the contention that the Agreement is adverse to the public interest by reason of any tendency to establish industry-wide bargaining. The terms of the agreement are unrelated to the nature of the bargaining unit, and despite effectiveness of the Agreement since 1958, there has been no transition to industry-wide bargaining. Similar contentions have previously been rejected. Six Carrier Mutual Aid Pact, 29 CAB 168, 172 (1959); Mutual Aid Pact Investigation, 40 CAB 559, 604-606, 631 (1964). *Cf.*, Kennedy v. Long Island Railroad Company, 211 F. Supp. 478, 488 (1962).

We further disagree that this proceeding must be considered in conjunction with the issues in the Airline Industrial Relations Conference Investigation, Docket 23267. That proceeding presents independent issues and must be determined on its own merits.

Mohawk, as well as other mutual aid members affected by strikes, to find a resolution to their strikes throughout the course of difficult labor negotiations.[15] Indeed, in the period between 1968 and 1971, the number of strikes among Agreement members has been relatively minimal, compared to successful negotiations of labor settlements. During this period some 92 out of a total of 102 collective bargaining agreements entered into by carrier parties have been negotiated without a strike.[16]

Also of significance is a provision of the Mutual Aid Agreement itself which provides an additional incentive toward good faith bargaining. Payments are provided for under the agreement to the struck carriers only where the union has failed to follow the recommendations of a Presidential Emergency Board; or where the struck party *has in all respects acted in compliance with the Railway Labor Act* and a Presidential Emergency Board does not offer a solution. Should the carrier fail to bargain in good faith in negotiations for settlement of a strike, and hence be in violation of the Railway Labor Act, the carrier would not be entitled to Mutual Aid payments.

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[15] See, *e.g.*, Exhs. TCE-13, 22, 23; MO-C. Although the unions assert that the Northwest strike was prolonged by an alleged Railway Labor Act violation, against which a preliminary injunction was issued by a Federal District Court in Minnesota, the record fails to support their contention. The Mediator's Report attributes the continuation of the Northwest strike, after settlement of the economic issues, to matters unrelated to the alleged Northwest violation of the Railway Labor Act. In any event, the record does not reveal any reasonable connection between the Mutual Aid payments, and the alleged Railway Labor Act violation, even if it were assumed that such a violation did prolong the strike. Finally, even assuming such a connection, isolated instances of the nature of this alleged Railway Labor Act violation, which does not involve a refusal to bargain in good faith, would not, in light of the other considerations set forth herein, alter our conclusion that the agreement is consistent with the public interest, and should be approved subject only to the conditions imposed herein.

[16] TCE-11 (Rev.).

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In sum, we think that the Mutual Aid Agreement, as amended, does not relieve carrier management of significant economic pressure to settle a strike, even though it may enable a carrier to survive a strike without permanent financial instability. In other words, the Agreement does not upset the collective bargaining process, which depends on the stimulation of economic pressure on both sides of the bargaining table. We simply cannot conclude, on the basis of this record, that there is any likelihood that the mutual aid payments would contribute to the unnecessary prolongation of strikes or otherwise upset a fair economic balance between labor and management in any manner which would be contrary to the public interest. Rather, as the Board has previously found, we find again that the Mutual Aid Agreement represents a legitimate resort by the carriers to economic self-help, in a manner that is in no way inconsistent with the national labor policy.[17]

Nevertheless, the experience under the 1969 amendments to the Mutual Aid Agreement has been very limited, and, as noted, the period represents an atypical one in terms of airline prosperity. Accordingly, we believe it appropriate to limit our approval to a period of five years in order to provide an opportunity to reexamine the amended agreement in light of a broader base of experience under the new provisions.

We also disagree with the conclusion of the Administrative Law Judge that the amendments to the Agreement would be detrimental by reason of the adverse impact which the increased payments may have upon the non-struck carriers who must pay them under the Agreement, and that

[17] Mutual Aid Pact Investigation, 40 CAB 559, 561, 607-609 (1964). See also, N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477 (1960); Kennedy v. Long Island Railroad, 319 F. 2d 386 (1963), *cert. denied* 375 U.S. 830 (1963).

to resist what it considered to be a reasonable settlement, or to try to force unreasonable concessions on the part of labor.

The pressures for settlement of a strike arise most significantly, of course, from the major loss of revenues which might be anticipated but for the strike. These include not only the actual out-of-pocket losses occasioned within the strike period, but also the loss of profits which would have accrued had there been no strike. Moreover, in addition to the immediate financial repercussions, a strike produces a serious impact on the carrier's operations even after the strike has been settled. In addition to costs, such as crew training, associated with the resumption of operations, there is the immediate loss of post-strike revenue attribuable to the absence of advance bookings. Further, and of substantial significance, there is the long-term loss of traffic attributable to the loss of the carrier's identity in the market, part of which may be permanent by reason of changed travel patterns of the airline's customers. The detrimental impact of these post-strike factors necessarily become more severe the longer a strike continues.

There is, of course, the possibility that a relatively weak carrier might settle a strike upon terms it did not consider would be reasonable, in order to avoid permanent financial deterioration as a consequence of strike losses. In such circumstances, the absence of mutual aid payments, or the absence of the increases in the mutual aid payments, might result in the settlement of a strike (on the union's terms) earlier than would be the case had the carrier been better able to withstand the financial repercussions of a strike. Indeed, under such circumstances a carrier might be forced to accept demands which, in the long run, could have even more serious economic consequences for the carrier. The

mutual aid payments, in this respect, serve the purpose of protecting the carrier from being placed in the position where its precarious financial situation—rather than the merits of the negotiating positions—becomes the predominant factor in determining when a strike should be settled. The Board is unable to conclude that this purpose is contrary to the public interest.

In support of his conclusion that the increased payments posed tempting short-term benefits, Judge Present cited particularly certain "operating profits" experienced by National, Northwest, and Mohawk during their strike periods, which were attributable to the new higher level of the amended mutual aid payments, as well as TWA's decreases in losses. Thus the record shows[11] that National, for the strike period from January 31 to May 26, 1970, experienced a net profit of $810,000, following receipts of some $28 million in mutual aid. Northwest, for the strike period from July 9 to December 4, 1970, reported a net profit of $17.9 million, following receipts of $47.3 million in mutual aid payments. Mohawk similarly reported a profit of $29,000 in the first quarter of 1971 attributable to mutual aid payments for a part of its strike. However, if the financial results of the full strike period in which Mohawk participated in the Agreement are included (including an additional six days in April, *i.e.*, January 1 to April 6, 1971), the net is a loss of $426,000. In addition, for the two-day TWA strike (October 20-21, 1970), TWA reduced its net loss from $3.3 million, during the strike period, to

[11] Serious strikes occurred on Air West and Northwest Airlines following close of the hearings in this case. The facts regarding these strikes, and data concerning the relationship between the mutual aid payments and strike losses are therefore outside the record. However, based on these carriers' financial reports to the Board, we find that had such facts been included in the record, they would not have altered our conclusions herein.

$879,000 by reason of $2.5 million in mutual aid payments. TWA experienced extraordinary losses in 1970, and the $879,000 net loss was less than the $1.7 million loss projected for this period assuming there had been no strike.[12]

However, as previously noted, there must be considered not only the direct operating results during the actual strike period, but the loss of normal profits during such strike period, and post-strike losses, as well. The Administrative Law Judge's analysis is based on strikes which occurred primarily in 1970, an atypical year which reflected losses by many carriers. Nevertheless, even in this period, in the absence of the strike National and Northwest reasonably estimated that their profits would have been some $6 million and $29 million, respectively. Taking into account loss of estimated normal profits, strike period losses, and post-strike losses, neither of these two carriers recovered even 60% of their total losses attributable to the strike. National suffered total strike losses of $47.4 million ($6 million estimated normal profit; $27.2 million strike-period losses; and $14.2 million post-strike losses), against mutual aid receipts of $28 million. Northwest suffered total strike losses of $87.5 million ($29.3 million estimated normal profit; $29.3 million strike-period losses; and $28.9 million post-strike losses), against mutual aid receipts of $47.3 million. The losses for each of these carriers, as a result of their strikes (taking into account the anticipated profits which they otherwise would have achieved, as well as post-strike losses) amounted to some $19.4 million and $40.2 million, respectively, even after receipt of the increased mutual aid payments. Thus National recovered only some 59.1% of its total strike losses in mutual aid payments, while Northwest's mutual aid payment recovery represented only some

[12] Source: TCE-53, MO-6.

strike losses resulting in ruinous financial instability. Hence, such carriers may reasonably think they need the protection afforded by mutual aid "insurance." The choice of whether to pay what it costs to have such insurance is of course for the individual carrier to make, but if the carrier chooses to do so, we are not disposed, on this record, to foreclose that choice.

III.

We further find that participation in the agreement by the local service carriers would not be adverse to the public interest, provided it is made subject to an appropriate subsidy condition. Accordingly, the Agreement should, in this respect also, be approved. The same considerations which have led us to conclude that the Mutual Aid Agreement provides, at a reasonable cost, substantial protection from crippling strike losses, and therefore is consistent with the public interest, similarly apply to the local service carriers. Indeed, in many respects, the local service carriers, which as a group have less financial stability than the trunkline carriers, require such protection to a greater extent. Local service carriers simply do not have the financial depth which will permit them to absorb what may be huge strike losses.

The Administrative Law Judge considered that local service carriers should not be permitted to participate in the agreement. He reasoned that such participation would be inconsistent with the scheme for subsidy payments pursuant to section 406 of the Act, would represent an unwarranted financial gamble by the local service carriers and the Board, and would represent an unjustified financial drain on the trunkline carriers. We are not persuaded by these arguments.

We believe that with an appropriate subsidy condition there will exist no inconsistency between the local service carriers' participation and the section 406 subsidy provisions. The condition would provide that no payment or obligation incurred pursuant to the Agreement may be claimed as an expense for purposes of computing subsidy need under section 406 of the Act. We recognize that without such a condition, subsidy might indirectly provide strike support for carriers that have no subsidy need or entitlement under the standards of section 406 of the Act. While the Mutual Aid represents in our view a legitimate "self-help" form of strike insurance, we believe that it is not in the interest of the public to underwrite this form of strike insurance by Federal subsidy.[27]

We reject, as placing form over substance, the contention that the Mutual Aid payments would inevitably be funded by Federal subsidy because there is no practical means for segregating the subsidy funds from the carriers' general funds from which Mutual Aid payments might be drawn. Subsidy payments normally make up a very small portion of a carrier's overall revenues. So long as Mutual Aid payment expenses are excluded from the subsidy computations, there is no basis for concluding that the Mutual Aid payments would, in any realistic way, be funded by subsidy payments.

It is urged to us that subsidy ought not be paid unless actual operations are conducted, and hence should not be payable during strikes. From this premise it is argued that Mutual Aid payments are inconsistent with the Act because by definition they are paid during a strike when the

[27] *Cf.*, Mutual Aid Agreement Between American Airlines, Inc. and Mohawk Airlines, Inc., Order E-24213, September 23, 1966; Pan American Mail-Rate Case, 35 CAB 540, 555 (1962).

carrier is not operating. Even assuming the correctness of the premise, we reject this argument. So long as a local service carrier's participation in the Mutual Aid Agreement does not increase the level of Federal subsidy paid to the carrier, we can perceive no inconsistency between the Agreement and the subsidy scheme of the Act arising simply because Mutual Aid payments might be received in periods when subsidy was not payable. We find nothing in the Act forbidding a carrier to receive private funds from legitimate sources during a strike. Similarly, the argument that participation represents an unwarranted gamble for both the local service carrier and the Board, fails to convince us. There is, of course, no assurance that receipts will exceed payments. However, as noted, membership is in effect a type of insurance which, for a reasonable and limited cost, provides the local service carriers with significant protection against the financially crippling and far greater losses that might be suffered as a result of a strike. Thus, for example, Piedmont has a maximum annual participation of from $500,000 to $600,000 based on its revenues. In contrast to this limited maximum annual participation, it would have received payments as a result of its 28-day 1969 strike amounting to $1.8 million to offset a strike loss of some $2.2 million, had it been a Mutual Aid participant at that time.[29] The one-percent limitation provides reasonable assurance that no local service carrier will be seriously adversely affected by payments under the Agreement.

It is also argued that trunklines may make Mutual Aid payments which are proportionally higher than local ser-

[28] But see, American Overseas Airlines, Inc. v. C.A.B., 254 F. 2d 744 (1958).

[29] Exh. PI-6.

vice carriers would have to make and that this higher proportion is a financial drain adverse to the public interest. We are not persuaded. First, as we have noted, the Agreement provides reasonable assurance that the financial drain to the extent it may exist, will be borne by those carriers which, on the basis of total revenues, are in the best position to incur it. Second, we do not find that the potential receipts which a carrier may derive from the Agreement in the event of a strike are unreasonably disproportionate to the potential payments which that carrier may have to make to another carrier in the event of a strike on the second carrier. Moreover, it does not appear unreasonable to us for the trunkline carriers to seek, and pay a price for some protection against the possibility that a local service carrier, solely by reason of its relatively weak condition, might succumb to employee demands which otherwise would be unacceptable and which could then be demanded of the trunkline carriers as a new industry norm.

It is unfortunate, of course, that all the participants in the Agreement will suffer economic loss by reason of a strike on one carrier participant. However, in our view, the Agreement equitably and reasonably distributes that loss among all the participants.

IV.

Looking at the Mutual Aid Agreement as a whole, we are mindful of the views of some that there would be fewer and shorter strikes if there were no Mutual Aid Agreement because there would be greater economic pressure on a carrier to settle. We are also mindful of the very real hardships which work stoppages in the airline industry inflict on the public. Serious personal inconvenience or

the amended Agreement is defective in that it does not attempt to differentiate among such carriers on the basis of their financial health. The plan, in effect, constitutes a form of strike insurance. Strike insurance not markedly dissimilar from that here involved has previously been considered by the courts as being consistent with the national labor policy.[18] In effect, the carrier parties to the Agreement are paying premiums based on collective loss experience, to provide protection against the possibility of far greater, and perhaps financially crippling, losses that would inevitably be suffered as a result of a strike.

The plan does not, of course, attempt to provide any assurance that the receipts, in the event of a strike, would be equivalent to the payments made under the plan in any given carrier case. As the trunkline carriers point out, nevertheless, since 1960 every present trunkline member of the Mutual Aid Agreement has suffered at least one strike, and 6 of the 9 members have been struck since 1969.[19] And as we have shown, the potential strike losses are indeed formidable.

Each individual carrier's mutual aid payments are modest in comparison. Thus, for the period January 1, 1970 to June 30, 1971 (the period in which the higher level of supplemental payments was in effect) the trunkline carriers' contributions to supplemental payments represented a range from .44% (for Eastern and Continental) to .50% (for Braniff and United) of their operating revenues for the same period. American's, Pan American's and TWA's percentages were .46%, .48% and .46%, respectively. The percentages for the local service carriers, with the excep-

[18] See, Kennedy v. Long Island Railroad, 319 F.2d 387 (1963), *cert. denied* 375 U.S. 830 (1963), affirming 211 F. Supp. 418 (1962).

[19] TCE-4.

tion of North Central (.03%), were each .04%.[20] (See Attachment 1.)

This level of payments may be contrasted with the ratio of National's, Northwest's and Mohawk's strike losses to each carrier's operating revenues for the year preceding the strike. These losses represented for National 17.7%,[21] for Northwest 18.8%,[22] and for Mohawk 16.8%,[23] of the carriers' prior year's operating revenues.

In addition, a substantial safeguard is provided in that no carrier can be required to make contributions to the plan, in the form of supplemental payments, in an amount exceeding one percent of its operating revenues for the previous calendar year.[24] While the one-percent limitation may not be perfection in insuring against detrimental impact upon member carriers, it does offer significant protection reasonably related to the ability of carriers to pay. Similarly, the proportional share of a carrier's contribution to supplemental payments made to a struck carrier is based on the paying carrier's previous year's revenues. Thus,

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[20] Not included are National, Northwest and Mohawk whose revenues were significantly affected by lengthy strikes during the period, and Western which did not become an agreement participant until October 3, 1970.

[21] 1969 operating revenues, $268 million. Strike losses, $47.4 million (see p. 13, *supra*).

[22] 1969 operating revenues, $465 million. Strike losses, $87.5 million (see p. 13, *supra*).

[23] 1969 operating revenues, $66.2 million. Strike losses for the total period of the strike (Nov. 1970 to Apr. 1971), $11.1 million (including only actual losses during the strike period) (Exh. MO-6). Mohawk became a Mutual Aid participant on January 1, 1971.

[24] There is, of course, a high probability that this 1% contribution would not be required in many years, particularly in light of the increased representation of the air carrier industry reflected by the present air carrier participation. For example, for the 1970-June 1971 period (Attachment 1), in which several serious strikes occurred, the 1% limit was not reached.

the contribution is reasonably related to the losses that might be anticipated in the event of a strike, and these payment criteria provide additional protection against unduly burdensome payments.

While, as Judge Present points out, it is possible for the one-percent limitation to be exceeded by reason of the windfall payments,[25] it does not follow that any increased detriment would be incurred. Windfall payments by definition represent added profits attributable solely to the strike.[26]

We are therefore of the view that the plan does provide substantial protection from financially crippling strike losses, at a cost which is reasonable. It may be that the higher payments will impose a certain financial burden on carriers which may be financially weak. For the reasons indicated, we think this burden, unlike potential strike losses, will not be a crippling one. In any event, such carriers are precisely those which are most vulnerable to strike threats and which could, in the absence of mutual aid payments, face a choice between acceeding to demands creating expenses far exceeding strike losses or incurring

[25] The one-percent limitation applies only to supplemental payments, not to windfall payments.

[26] The Administrative Law Judge, utilizing an analysis based on the rate of return on investment of the respective carriers, urges that the payments are inequitably distributed among the paying carriers. We find this analysis unpersuasive. For example, although United had a lower rate of return on investment than other carriers, its revenues are significantly higher than carriers with a higher rate of return on investment, and hence it is capable of making substantially higher mutual aid payments. Thus, although United's payments of some $21.9 million in mutual aid payments (more than one-half of which were windfall payments) for the period January 1, 1970 to June 30, 1971 (the period in which the higher level of payments was in effect) represented the highest payments of the carrier parties to the Agreement (J.D., App. E), the payments represented only .99% of its $2,213,000,000 [illegible] revenues for this period. The highest payment in terms of percentage of revenues (Eastern's 1.34%) included some 61% in windfall payments (see Attachment 1).

2. That except to the extent granted herein, the application and all other requests herein, should be denied or dismissed.[31]

An appropriate order will be entered.

BROWNE, Chairman, GILLILLAND, Vice Chairman, and TIMM, Member, concurred in the above opinion. MINETTI and MURPHY, Members, filed the attached joint concurrence and dissent.

[31] A motion filed by the Air Line Pilots Association, requesting an order requiring Northwest Airlines to return, or to place into escrow, all Mutual Aid payments received pursuant to the amendments disapproved by Administrative Law Judge Present, and barring or escrowing such future payments, was withdrawn as part of the settlement of the Northwest strike, and accordingly, will be dismissed.

PERCENT OF MUTUAL AID PAYMENTS
TO CARRIER REVENUES
1970 — JUNE 1971

Carriers*	Revenues ($000) (1970-6/71)	Payments ($000) Wind.	Supp.	Total	Percent of Payments to Revenues Wind.	Supp.	Total
TRUNKS							
American	1,701,893	3,136	7,880	11,016	.18%	.46%	.65%
Braniff	485,139	175	2,407	2,582	.04%	.50%	.53%
Continental	439,508	1,017	1,913	2,960	.24%	.44%	.67%
Eastern	1,498,282	13,440	6,571	20,011	.90%	.44%	1.34%
Pan American	1,661,428	2,286	7,937	10,223	.14%	.48%	.62%
TWA	1,716,770	1,310	7,962	9,272	.08%	.46%	.54%
United	2,213,133	10,967	10,961	21,928	.50%	.50%	.99%
LOCAL SERVICE							
Frontier	138,384	—	59	59	—	.04%	.04%
Hughes Air West	113,635	—	50	50	—	.04%	.04%
North Central	139,554	—	43	43	—	.03%	.03%
Ozark	107,851	—	42	42	—	.04%	.04%
Piedmont	108,925	—	41	31	—	.04%	.04%

* Not included are National, Northwest and Mohawk whose revenues are substantially affected by lengthy strikes during the period, and Western which did not become a Mutual Aid party until October 3, 1970.
Source: CAB Air Carrier Financial Statistics; I.D. App. E

Opinion

MINETTI and MURPHY, Members, Concurring and Dissenting:

We cannot join the majority in giving unqualified approval to the Mutual Aid Agreement in its currently amended form. At the same time, we do not urge total disapproval of the Agreement. Rather, we would allow the Agreement to stand in the form in which it existed prior to the major amendments of October 1969, which increased both the level of "supplemental" payments to a struck carrier and the maximum annual obligation of a participating carrier to make such payments.[1] We also would approve, subject to the subsidy condition imposed by the majority, the December 1970 amendment which permits participation in the Agreement by local service carriers. However, we would disapprove as adverse to the public interest the October 1969 amendments relating to increased "supplemental" payments. Finally, we would remand for further hearing the issue of whether an additional condition should be imposed precluding payment of benefits under the Agreement to a struck carrier which has violated the Railway Labor Act subsequent to the commencement of a strike.

In letting stand the Mutual Aid Agreement as it existed prior to October 1969, we do not consider it necessary to find, and do not find, that the Agreement has been or will be affirmatively beneficial to the public interest, either by contributing to the "stability" of airline industrial relations or by assisting carrier managements in resisting union wage demands. In this connection, we regret that the Board's majority opinion here goes as far as it does in seeming to identify the public interest with strengthening the bargaining position of carrier management in airline

[1] The lesser amendments of October 1969 give us no concern and, like the majority, we would approve them.

labor disputes, which is the evident purpose of the Mutual Aid Agreement. Such an air of partnership between management and labor by a regulatory agency is antithetical to the national labor policy, and should be strictly avoided.

The Board's dilemma, of course, is a real one: under most circumstances, in view of its promotional role toward the air transportation industry and its regulatory responsibilities toward the traveling public, the Board is bound to regard whatever lowers airline costs as good, and whatever increases those costs as bad. Nevertheless, the Board cannot take that attitude toward airline wages without becoming a partisan on the side of management against labor. We do not suggest that the Board majority has here in any way deliberately set out to align itself with one side or the other of airline labor disputes. Nonetheless, it is difficult to read the majority opinion as a whole, with its recurrent emphasis on the "stability" assertedly afforded by the Mutual Aid Agreement and one the "reasonableness" of management positions (with no explicit recognition that union positions may be equally reasonable from the standpoint of the workers' interests), without deriving a distinct impression that the majority believes that strengthening management's bargaining power in wage disputes is an affirmatively beneficial thing.

However difficult it is for the Board to preserve a stance of total neutrality in labor-management conflicts, once the parties have fulfilled their statutory obligations under the Railway Labor Act, we believe the Board must bend every effort to do so. To that end, we would rigorously avoid making any judgments as to the reasonableness of either management or union positions and actions, either in gen-

worse to travelers, economic loss to shippers and consumers, lower revenues to airport operators, foreclosure of numerous business opportunities and reduced economic life to the community as a whole—all are the immediate results of airline strikes, particularly over routes which only the struck carrier is authorized and willing to serve.

Obviously, a strike is far from the ideal way of resolving labor disputes. Fortunately, as the record reveals, the great majority of labor disputes are resolved by negotiation between the parties without recourse to a strike. Nevertheless, under the national labor policy, a strike remains available as an ultimate resource in reaching an accommodation between employee demands and terms acceptable to managements.

Whether the disruption caused by work stoppages in the air transportation field is sufficient to warrant revision of the national labor law so as to prevent or control them is a question of policy for the Congress. However, we do not believe the appropriate remedy is to compel carriers—whether by law or by undue economic pressure—to accept all requests of employees, just as we would not agree that employees should be forced to accept all proposals of carrier managements.

Collective bargaining in good faith remains the cornerstone of national labor policy. Collective bargaining is encouraged when there is substantial economic pressure on both sides of the bargaining table. As we have observed, the perishable nature of air transportation makes individual carriers peculiarly vulnerable to strike threats. The Mutual Aid Agreement is an effort on the part of the carriers collectively to strengthen the bargaining position of the individual carrier. We conclude that it is not contrary to the public interest for the carriers to do so, in the form and

to the extent provided in the Agreement now before us. As we have found, the Agreement does not so alter the bargaining balance as to lift from the carriers heavy economic incentive to settle work disputes and hence does not remove the pressures essential for collective bargaining in good faith. At the same time, the Agreement does afford the carriers a greater measure of influence over labor costs ultimately are reflected in higher fares and rates to the traveling and shipping public, additional restraints consistent with collective bargaining are, in our opinion, not contrary to the public interest.

We have given due consideration to all of the contentions of the parties and find, except to the extent indicated, that they do not alter our decision.

Accordingly, in view of the foregoing and all the facts of record, it is found:

1. That the Airlines Mutual Aid Agreement, including the Airlines Mutual Aid Agreement as amended by the amendments of October 1969 and December 1970, is not adverse to the public interest or in violation of the Act and should be approved for a period of five years, subject to the following conditions:

(a) The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;[30]

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[30] We find no justification for departure from those conditions which have been attached to our approval of the Mutual Aid Agreement since 1959, so as to include the condition proposed by ALPA that would provide that Mutual Aid payments should be excluded from allowable expenses for determining rates under the Federal Aviation Act. The question of the allowance of such expenses in connection with rate proceedings is more appropriately reserved for consideration in connection with such rate proceedings as may come

(b) The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

(c) Approval of participation in the Agreement by each carrier party thereto is subject to the condition that no payment or obligation incurred pursuant to the Agreement shall be claimed as an expense for purposes of computing the need of such carrier for compensation payable by the Board under section 406 of the Federal Aviation Act; nor shall any carrier be entitled to receive any compensation payable by the Board for payments made or obligations incurred by that carrier pursuant to the Agreement;

(d) In accounting for the amounts due to others and the amounts due from others under the Agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by Part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the Agreement as may be reasonably required by the Director of the Board's Bureau of Operating Rights; and

(e) Copies of all arbitrators' decisions and awards issued under the Agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

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before the Board. It is sufficient to provide, as we have in the past, that our approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act.

eral or in relation to particular disputes.[2] We would recognize that "reasonableness" in labor disputes is a term with no fixed or generally agreed meaning, and one which inevitably takes on quite different connotations on opposite sides of the bargaining table.

Accordingly, we would abandon all attempts to find affirmative public benefits in the Mutual Aid Agreement, and instead would let it stand (in its pre-October 1969 form) as being simply neutral *vis-a-vis* the public interest. It is by now firmly established that agreements of this sort among employers in the same industry are a legitimate and permissible form of mutual economic self-help, just as are mutual assistance agreements between labor unions.[3] Given the national policy of strict governmental neutrality in labor disputes, we think the proper basis for letting the Agreement stand is simply that carrier managements should not be precluded from engaging in any lawful measure of self-help unless it is affirmatively shown to be detrimental to the public interest. In our view, based on the evidence of record in this proceeding, the Mutual Aid Agreement as it existed prior to the October 1969 amendments meets this negative test.[4]

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[2] In a few limited areas, such as subsidy, the Board may be required in some circumstances to draw conclusions as to the reasonableness of management or union conduct. See *Reopened Transatlantic Final Mail Rate Case*, 42 C.A.B. 195, 199-204 (1965), affirmed *sub. nom. Trans World Airlines* v. *C.A.B.*, 385 F.2d 648 (C.A.D.C. 1967), *cert. denied*, 390 U.S. 944 (1968). It ought, however, to avoid such judgments wherever possible, particularly in view of its frequently acknowledged lack of any special expertise in this area.

[3] See *Kennedy* v. *Long Island R.R.*, 319 F.2d 386 (1963), *cert. denied*, 375 U.S. 830 (1963); *NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477 (1960).

[4] When the Board in 1964 renewed its original approval of the Mutual Aid Agreement, we were both of the view that the Agreement in its then existing form would be a source of disruption and insta-

Opinion

Similarly, once it is assured that mutual aid payments will not be permitted to increase carrier subsidy, we see no justification for excluding the local service carriers equally as entitled as the trunkline carriers to band together for mutual self-help in labor negotiations, and it can hardly be contended that wage standards in the two sectors of the industry are unrelated or that labor settlements in one sector do not materially influence negotiations in the order. The limitations on a participating carrier's mutual aid obligations under the Agreement, together with the local service carriers' present-day low ratio of subsidy receipts to commercial revenues, insure as a practical matter that any mutual aid payments by local service carriers will come out of commercial revenues and not out of subsidy. We agree that the majority's proposed condition is adequate to insure that subsidy will not be increased as a result of mutual aid payments. This disposes of the argument that the weight of governmental subsidy will be thrown on the management side of the bargaining scales.

However, in our judgment the increased level of "supplemental" strike payments provided by the October 1969

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bility in airline labor relations. Member Minetti took this view as to the entire Agreement, Member Murphy only as to the "supplemental payments" provisions which had been added to the original "windfall" clause of the Agreement. *Mutual Aid Pact Investigation*, 40 C.A.B. 559, 564 (1964) (dissenting opinions).

Member Murphy has now concluded on the basis of the present record that his earlier fears have not been borne out by the experience of the years 1964-69, and hence would approve the Agreement as it stood prior to the October 1969 amendments, on the basis of the negative public-interest test described in the text *supra*. Member Minetti continues to view the Agreement as provocative toward labor and as generally inimical to good labor relations in the airline industry, and accordingly he cannot give it his approval; he acknowledges, however, that the evidence of record does not affirmatively bear out his earlier fears of disruption, and therefore does not now urge that the Agreement be disapproved.

amendments to the Mutual Aid Agreement creates a different situation—one in which there is a distinct danger that labor peace will be disrupted and interruptions of airline service prolonged by the level of payments available under the amended Agreement. In this regard we agree with the conclusions of the administrative law judge who heard the testimony of the witnesses.

The 1969 amendments increased the level of "supplemental" payments to a struck carrier from 25 percent of its normal pre-strike operating expenses to a sliding scale beginning at 50 percent of normal expenses for the first two weeks of a strike and declining by 5 percent increments to a level of 35 percent of normal expenses for the fifth and subsequent weeks. Whereas the earlier 25 percent level of supplemental payments generally did not fully reimburse a struck carrier for its actual out-of-pocket running expenses during a strike, the new 35-50 percent level tends (and, indeed, was designed) to exceed a struck carrier's actual running expenses, so that in work stoppages occurring under the amended Agreement it has become typical for the struck carrier to show an operating profit during the strike period. To make possible these increased supplemental payments, the 1969 amendments also raised the annual ceiling on each participating carrier's obligation to make such payments from ½ to 1 percent of its operating revenues in the preceding calendar year.

The administrative law judge found that the increased level of supplemental payments under the 1969 amendments creates a dangerous inducement to a struck carrier in some circumstances to prolong a strike unnecessarily for the short-term benefits of the increased payments. He also found that the increased ceiling on participating carriers' supplemental payments obligations involves a threat

to the financial soundness of the paying carriers, particularly those already in financial distress for other reasons. He considered these twin dangers sufficiently serious, and their consequences sufficiently adverse to the public interest, to warrant disapproval of the two major October 1969 amendments to the Agreement.

Although the Board majority inferentially admit that the increased level of supplemental payments is bound to influence carrier managements in the direction of holding out against union demands,[5] they argue that this is not contrary to the public interest since management's bargaining power in the airline industry is unduly weak to begin with, as a result of the perishable nature of the industry's product. They also cite statistics tending to show that airline wages have increased more rapidly than those in other transportation industries; than the consumer price index (during 1967-70); than airline employee productivity (after 1968); or than airline wages themselves before the 1969 amendments.

All of these arguments we find quite irrelevant. There is no showing that air transportation is more vulnerable to strikes than other service or perishable-goods industries, and we are aware of no requirement of the national labor policy that all industries must be put on the same bargaining footing as hard-goods manufacturing industries. As for the majority's statistics, in each case they ignore other factors which would appear to account adequately for the results, without assuming any exceptional weakness of

[5] According to the majority, it is only "unreasonable" union demands which will thus be resisted. But one man's unreasonable demand is another's reasonable request; as we have already pointed out, it is both futile and contrary to the Board's proper role as a neutral in labor conflicts to attempt to analyze the effects of the mutual aid amendments in these terms.

airline management's bargaining position in labor negotiations.[6] In our view, the issue is not whether the strengthening of airline management's bargaining position which obviously results from the 1969 mutual aid amendments is a good thing *per se*—a judgment which in our view the Board need not and should not make—nor is it whether airline employees retain effective bargaining power, which they patently do. The issue, rather, is whether under some significant sets of circumstances the 1969 amendments may give carrier management an incentive to act irresponsibly in prolonging a strike.

In our view the administrative law judge was right in his assessment of this danger. The critical point is that under the 1969 amendments a struck carrier's mutual aid benefits can be so generous that it can show an operating profit while its operations are shut down by a strike.[7]

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[6] Thus, while airline wages have increased more rapidly than those in other transportation industries, for most of the period under discussion airline revenues, profits, and productivity likewise grew much more rapidly than those of the other industries, so that generous wage increases, higher than in other industries and well in excess of increases in the cost of living, were readily supportible. Such wage trends have a momentum of their own, so it is not surprising that airline union wage demands continued high even after industry profits turned downward, especially in view of the accelerating inflation of the latter years. Productivity after 1968 fell off largely because of circumstances—the fall-off in traffic growth and the consequent glut of capacity and sharply lower load factors—over which employees had little or no control. Moreover, wage increases in excess of productivity gains are typical of a period of inflation, and are in no way unique to the airline industry. Similarly, the majority's attempt to draw conclusions from the fact that airline employment costs increased more rapidly in 1970, under the amended Agreement, than in 1967, 1968, or 1969, ignores the markedly higher rate of inflation in the later year. We agree that these statistics do not show that the 1969 mutual aid amendments deprived airline employees of effective bargaining power, but they also do not rebut the administrative law judge's concern over the danger of needlessly prolonged work stoppages.

[7] From the record it is not possible to determine whether such strike-period operating profits will occur in all cases or only in some, but clearly they are a definite possibility and do not represent simply a freak situation unlikely to recur in the future.

This seems to us a fundamentally unhealthy situation, conducive to results adverse to the public interest, much as would be in insurance scheme which resulted in the insured collecting more than the value of his loss.

To be sure, as the majority point out, the struck carrier also foregoes its "normal profits" while the strike continues. But this factor cannot always be relied on to give the struck carrier the strongest incentives to settle the strike. In several of the strikes which have occurred since the 1969 amendments took effect, the struck carrier was not in fact earning "normal profits" or indeed any profits immediately prior to the strike, and so did not forego such profits as a result thereof. This situation may well recur in future strikes[8]—particularly if, as the carriers claim, the unions concentrate their strike threats on weak carriers.[9] Even where a carrier is operating profitably on an annual basis, there are frequently "off-season" months during which it expects to lose money; if a strike occurred at such a time, the carrier would not be deterred from prolonging it unnecessarily by a loss of "normal profits".

The majority also point to post-strike losses, which are not directly compensated by mutual aid payments, as a strong inducement to prompt settlement of strikes. But, while we do not deny the reality of post-strike losses, their incidence and measurement is a matter of great complexity

[8] We think the majority are much too quick in dismissing 1970 as an "atypical year" in this connection. We note, also, that in other contexts the majority are quite prepared to rely on 1970's experience where it suits their purpose.

[9] It should be said, however, that the record gives little or no support to this contention of the carriers. On the contrary, it would appear that if anything it has been the more profitable carriers which have suffered the longest and most costly strikes, although the correlation between profitability and strike losses is certainly low. (See I.D., Appendices C through G.)

and involves a considerable degree of speculation. It is surely significant that the participating carriers have never been able to agree among themselves on a valid measure of post-strike losses, so as to permit their direct compensation under the Mutual Aid Agreement. Clearly a great many factors go into determining how serious post-strike losses will be: a struck carrier will presumably regain its normal level of traffic more quickly in monopoly than in competitive markets, and in the latter it will make a great difference whether its principal competitors were also struck or were operating. It is by no means clear from the record that prospective post-strike losses increase in any simple way in direct proportion to the length of a strike.[10] Accordingly, it might well happen that, once a strike commenced, the struck carrier's management could believe that most of the prospective post-strike losses were already accrued and inevitable, and would not be greatly increased by a delay (within limits) in settling the strike.

We cannot demonstrate that any of these situations have in fact occurred since the 1969 amendments were adopted. As the record in this proceeding amply demonstrates, it is extremely difficult to sort out the underlying motivations in the various actions of the parties to a labor dispute, and attempts to do so are seldom profitable. All that can be said with reasonable confidence is that such situations *can* occur, and that when they do the monetary incentives for carrier management to settle a strike as soon as reasonably possible will be seriously weakened.

We do not ignore the other institutional incentives which militate for each settlement of a strike. But labor disputes

[10] For example, the cost of requalifying pilots appears to be an either-or proposition which, once incurred, does not increase with the further prolongation of the strike. Similarly, post-strike traffic demand will be profoundly influenced by seasonal factors.

are not feasts of pure reason; strong human emotions are frequently generated, even in men charged with managing giant organizations. Thus, in the interests of minimizing disruption due to strikes, it is desirable that there always be strong financial motives on both sides for the prompt settlement of disputes, both prior to a strike and after one has begun. We agree with the administrative law judge that the 1969 mutual aid amendments, by making it possible for a struck carrier to show an operating profit during the strike period, go too far in reducing the financial incentives for carrier management to settle a strike promptly once it has begun.

We also agree with the judge—though this in our view is a lesser factor—that the increased liability of participating carriers to pay supplemental benefits under the 1969 amendments poses an unacceptable threat to the financial stability of the paying carriers. As the judge pointed out, the defect of the Agreement's provision for supplemental payments is that it takes no account of the current financial condition of a paying carrier; and, indeed, the bulk of the mutual aid payments since the 1969 amendments took effect have been to otherwise highly profitable carriers from carriers who were currently either losing money or earning less than a reasonable return on investment.

The 1969 amendments' increase in the level of and ceiling on supplemental payments markedly aggravates the ability-to-pay problem which existed under the prior agreement. In an 18-month period under the 1969 amendments nearly as much ($83.6 million, 60 percent of it in supplemental payments) was paid out under the Mutual Aid Agreement as in the preceding 8 years ($87.7 million, only 22 percent of it in supplemental payments). During the same 18-month period over $10 million in mutual aid pay-

ments (nearly 80 percent supplemental) were assessed against Pan American, a carrier whose operating losses were and have continued to be so substantial as to occasion serious Board concern.[11] Particularly in view of the potentially adverse effect on carrier incentives created by the increased supplemental benefits payable under the 1969 amendments, we think the price to those participating carriers already in financial difficulties is too high to be in the public interest.

The remaining issue which we do not consider to have been adequately dealt with is that of Railway Labor Act violations occurring after a strike has begun. The union parties call to our attention the fact that, in the course of the Northwest-BRAC strike in 1970, a U.S. District Court in Minneapolis ruled that Northwest had violated the Railway Labor Act by offering improper inducements to certain of its striking employees to quit the union. A temporary injunction was issued.[12] This violation took place after the strike had begun, and thus by definition could not have had anything to do with causing it. However, the union parties assert that the violation resulted in prolonging the strike because, after agreement was reached on the economic issues which were the strike's cause, the carrier insisted on including in the back-to-work agreement provisions which the unions contended would require them to ratify the carrier's Labor Act violations.

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[11] Pan American's over $10 million in mutual aid payouts during this period contrasts with the less than $10 million in revenue diversion from this carrier which a majority of the Board recently held posed so great a danger to the carrier's financial integrity as to require disapproval of a route acquisition agreement between two other carriers. *Eastern-Caribair Acquisition Agreement*, Order 72-10-90, October 30, 1972.

[12] No final adjudication was had in this court case, which was dismissed by agreement of the parties upon settlement of the strike.

Opinion

In its prior approvals of the Mutual Aid Agreement, the Board has always placed great stress on the provision of the Agreement limiting the class of cases in which benefits are payable to those, *inter alia*, where a strike has been called in the absence of a Presidential emergency board "and the struck party has in all respects acted in compliance with the Railway Labor Act."[13] We agree that, if the Agreement is to be approved at all, it is essential that mutual aid not be payable where a strike has resulted from a carrier's violation of the Railway Labor Act.

The Northwest-BRAC strike incident, and another apparently similar incident during the more recent Air West-AMFA strike,[14] raises for us the question of whether mutual aid should continue to be paid in the event a carrier violates the Railway Labor Act after a strike is called, at least where the violation results in prolonging the strike. Although the above-quoted language of the Agreement is not completely free of ambiguity, it appears only to require compliance with the RLA by a struck carrier up to the time the strike is called, and not thereafter.[15] This

[13] Agreement, paragraph 1.(A)(ii); see I.D., Appendix A, p. 2.

[14] Press accounts (*Aviation Daily*, January 11, 1973, p. 58) indicate that a National Mediation Board arbitrator has recently ruled that Air West violated the Labor Act in certain respects after its strike began. Whether this violation arguably prolonged the strike is unknown. There is nothing in the present record concerning this incident, which occurred after the record was closed.

[15] The majority apparently think otherwise; they state (Opinion, p. 16) that, "Should the carrier fail to bargain in good faith *in negotiations for settlement of a strike*, and hence be in violation of the Railway Labor Act, the carrier would not be entitled to Mutual Aid payments." (emphasis added) We are not informed as to the basis for this interpretation, which appears to be more of a dictum than a firm condition to approval of the Agreement; nor are we aware that the parties to the Agreement have ever so interpreted it. Perhaps this matter could be explored further on reconsideration, or better yet on the remand which we recommend.

suggests the possibility that the Board's approval of the Agreement should be conditioned so as to require continued compliance with the Labor Act after a strike is called.

This issue seems to us to be of sufficient importance to warrant further consideration by the Board. We do not think it can be adequately dealt with on the present record. The Northwest-BRAC strike incident was litigated, but only in a somewhat desultory way; we do not have the benefit of findings thereon by the administrative law judge.[16] The Air West-AMFA strike occurred after the record here was closed, and thus has not been explored in the hearing process. Otherwise, there has been little discussion of post-strike-commencement RLA violations, and virtually none of the problems which might be encountered in conditioning the Agreement in the manner we have suggested, or of the precise form and scope of such a possible condition. Accordingly, we would remand the proceeding to an administrative law judge to take further testimony and present a new initial decision discussing the problems of, and possible remedies for, post-strike-commencement Labor Act violations.

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[16] The majority's attempt to dispose of the Northwest-BRAC incident in a footnote (Opinion, p. 16, note 15) seems to us entirely unsatisfactory. We do not believe the record has been sufficiently well developed on this point to permit a determination of whether the RLA violation found by the court did or did not, in conjunction with other actions of the carrier, directly or indirectly contribute to prolonging the strike. (We recognize that the mediator's report attributes the continuation of the strike after the economic issues were settled principally to other factors, but that is not necessarily decisive for present purposes.) The majority's attempt to shrug off the violation even if it did prolong the strike is unexplained, and seems wholly arbitrary. As for the distinction, obscurely suggested by the majority's footnote, between failure to bargain in good faith and other types of RLA violations, we see no comprehensible basis for such a distinction, which is not suggested by any earlier Board opinion relating to the Mutual Aid Agreement. Only further exploration upon a remand, in our view, can resolve these ambiguities and obscurities.

Opinion

Order 73-2-110

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C. on the
27th day of February, 1973

AIRLINES MUTUAL AID AGREEMENT

Docket 9977
Agreement CAB 21445
21445A1
21445A2
21445A3

Order

A full public hearing having been held in the above entitled proceeding, and the Board, upon consideration of the record having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That Agreement CAB 21445, as amended by Agreements CAB 21445A1 through A-3 (hereinafter referred to as the "Agreement"), be and it hereby is approved, for a period of five years, subject to the following conditions:

(a) The approval shall not be deemed a determination of the reasonableness of the financial provisions of the Agreement for future ratemaking or other regulatory provisions under the Act;

(b) The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

(c) Approval of participation in the Agreement by each carrier party thereto is subject to the condition that no payment or obligation incurred pursuant to the Agreement shall be claimed as an expense for purposes of computing the need of such carrier for compensation payable by the Board under section 406 of the Federal Aviation Act; nor shall any carrier be entitled to receive any compensation payable by the Board for payments made or obligations incurred by that carrier pursuant to the Agreement;

(d) In accounting for the amounts due to others and the amounts due from others under the Agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by Part 241 of the Economic Regulations (Uniform Systems of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the Agreement as may be reasonably required by the Director of the Board's Bureau of Operating Rights; and

(e) Copies of all arbitrators' decisions and awards issued under this Agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the

arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

2. That except to the extent granted, the application and all other requests herein, be and they hereby are denied or dismissed.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Acting Secretary

(SEAL)

Opinion

INITIAL DECISION OF EXAMINER ARTHUR S. PRESENT

Preliminary Statement

This is another stage of the *Mutual Aid* case which has been before the Board intermittently since 1958. The original agreement among six trunkline air carriers providing for mutual aid in the event of a strike, effective for one year, was approved by the Board after receiving statements from interested persons and hearing oral argument.[1] The parties to the agreement later sought approval of its renewal, as amended, and approval was granted, after a full evidentiary hearing, for a period of three years.[2] The agreement was most recently approved in 1970, again after an evidentiary hearing.[3]

In the last-referenced order, the Board not only approved the agreement in its form at the time of the evidentiary hearing, but the Board also approved amendments to the agreement effective as of October 31, 1969,[4] after the hearing had closed and the Examiner's initial decision had been rendered. On reconsideration, the Board withdrew its approval of the 1969 amendments because they had not been exposed to the evidentiary hearing process.[5] The Board said:[6]

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[1] *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168 (1959), *reconsideration denied*, 30 C.A.B. 90 (1959).

[2] *Mutual Aid Pact Investigation*, 40 C.A.B. 559 (1964).

[3] *Airlines Mutual Aid Pact*, Order 70-7-114, July 23, 1970.

[4] Agreement CAB 21445.

[5] Order 70-11-110, November 23, 1970.

[6] *Id.* at 2.

Opinion

> We are not presently persuaded that our earlier determination was in error. However, in fairness to the parties and to ourselves, we believe that we should reserve making a final judgment in this important matter until we have before us a fully developed record on the current facts, with all parties afforded an opportunity to present their evidence and arguments and to be fairly judged on that evidence and these arguments. [Case cited] Accordingly, we will remand the matter for the taking of further evidence with respect to the amended agreement on events which occurred since the close of the earlier hearing.[4]

[4] *Inter alia* the Board desires evidence as to the agreement's role, if any, in affecting the bargaining balance between labor and management in the air transportation industry. In addition, in the event that we reach a different ultimate conclusion on the merits of the amended agreement, we will nevertheless give consideration to whether our action should be prospective only.

In December 1970, shortly after the issuance of the Board's order, the agreement was again amended, to permit local service carriers to become parties.

After the completion of preliminary steps and due notice, public hearing was held in November 1971. The parties to the proceeding are the applicants (the Trunkline Carrier Parties[7] and the Local Service Carrier Parties),[8]

[7] American Airlines, Inc.; Braniff Airways, Inc.; Continental Air Lines, Inc.; Eastern Air Lines, Inc.; National Airlines, Inc.; Northwest Airlines, Inc.; Pan American World Airways, Inc.; Trans World Airlines, Inc. (TWA); United Air Lines, Inc.; and Western Air Lines, Inc.

[8] Hughes Air Corp. d/b/a Air West; Frontier Airlines, Inc.; Mohawk Airlines, Inc.; North Central Airlines, Inc.; Ozark Air Lines, Inc.; Piedmont Aviation, Inc.; and Texas International Airlines, Inc.

the Six Union Parties,[9] the Air Line Pilots Association, International (ALPA), the Allied Pilots Association (APA), the Aircraft Mechanics Fraternal Association, Locals 24 and 32 (AMFA), Allegheny Airlines, Inc., the Department of Transportation, and the Board's Bureau of Operating Rights (Bureau). Briefs have been filed,[10] and the case stands ready for decision.

One procedural matter requires disposition. The Local Service Carrier Parties have filed a motion to strike an affidavit attached to the joint brief of APA and AMFA and argument in the brief thereon, specifically the third and fourth sentences on page 4, the second sentence of the first paragraph beginning on page 5, and the third full paragraph on page 7. They contend that the record is closed, that the affidavit can be received as evidence only if the record should be reopened, and that there are no valid grounds for taking such action. If the affidavit should be given evidentiary status, the Local Service Carrier Parties ask that the Examiner grant equal status to an affidavit attached to its motion.

The affidavit appended to the APA/AMFA brief is by the national director of AMFA and concerns the AMFA strike on Air West which began December 15, 1971. As pointed out by the Local Service Carrier Parties, the record is closed. No showing has been made that reopening the record to receive AMFA's affidavit is necessary or war-

[9] Air Line Dispatchers Association; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC); Communication Workers of America; Flight Engineers International Association (FEIA); International Association of Machinists and Aerospace Workers (IAM); and Transport Workers Union of America (TWU).

[10] Briefs were filed on behalf of all the parties except Allegheny and the Department of Transportation.

ranted to assure an adequate record or to meet the ends of justice. On the contrary, to bestow evidentiary status on the affidavit at this juncture would tend to impair the orderly conduct of the Board's business. Therefore, the motion to strike shall be granted.

Background

As has been indicated, the Board remanded this proceeding to take evidence on events which transpired since the close of the earlier hearing. Accordingly, the focus of this remanded proceeding has been on such events in relation to the October 1969 and December 1970 amendments. However, in order to gain perspective, it may be helpful briefly to review the history of mutual aid.[11]

Initial Agreement

The concept of mutual aid had been under consideration by the major carriers at least since 1957. It was engendered by dissatisfaction with the functioning of the Railway Labor Act.[12] The initial agreement was triggered by a strike on Capital Airlines, Inc., by IAM beginning October 17, 1958. The labor dispute also embraced other trunkline carriers. Capital appealed to other large carriers for financial assistance. A one-year agreement was reached among six carriers—American, Capital, Eastern, Pan American, TWA, and United—effective October 20, 1958. The objective of the agreement was stated in the preamble to be "to bring about sound and reasonable economic conditions that will be of benefit to the air transport industry

[11] The agreement in its present form is set forth in Appendix A.

[12] 45 U.S.C.A. 151 *et seq.*

and to the public" in the face of "extreme and unreasonable demands made by representatives of certain of the classes and crafts of their employees".[13] The mechanics devised to achieve this goal were "windfall" payments, that is competing carriers would return to the carrier on strike the increased revenues such carriers gained attributable to the strike less the added direct expenses of transporting the diverted passengers. It appears that the reasoning behind this approach contemplated minimizing the leverage which the striking employees might otherwise gain from the loss of revenues during the course of the strike by the strike-bound carrier.

The Board approved the agreement subject to certain conditions, announcing, " * * * the basic agreement cannot be found to be adverse to the public interest or in violation of the Act."[14] The Board explained, "In performing our statutory function, we may do no more than measure the agreement against these standards [the standards of section 412(b) of the Federal Aviation Act of 1958, as amended][15] in order to ascertain whether its effect would be so detrimental as to endanger achievement of the objectives laid down by section 102 of the Act. Within this framework, the Board's order follows from the lack of any affirmative showing that the agreement is adverse to the objectives specified by the Congress."[16]

Four additional carriers joined the agreement in 1960—National on March 11, Braniff on March 14, Northwest on

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[13] 29 C.A.B. at 190.

[14] *Id.* at 170.

[15] "The Board shall by order * * * approve any * * * agreement * * * that it does not find to be adverse to the public interest, or in violation of this Act; * * *."

[16] 29 C.A.B. at 177. Footnote omitted.

March 18, and Continental on April 4. However, National withdrew effective December 31, 1961. Capital, the carrier serving as the catalyst for the agreement was merged into United, effective June 1, 1971, the Board finding that Capital was a "failing business."[17]

During the period the terms of the initial agreement were in effect there were 15 strikes on mutual aid carriers lasting a total of 418 days,[18] or an average of approximately 28 days per struck carrier. A total of $16,160,000 passed among the carriers pursuant to the agreement.[19]

1962 Amendments

The parties to the agreement amended it and, as amended, sought Board approval for an indefinite period. Insofar as pertinent here, the principal amendments injected the "standard amount" as a means of supporting struck carriers. Thus in the event the "windfall" payments did not equal 25 percent of the normal air transport operating expenses of the flight operations shut down, "supplemental" payments would be made up to that level. The 25 percent level was considered reasonably related to the expenses which a carrier might be expected to incur during the period it was suffering a strike. The obligation to make "supplemental" payments is not related to any competitive financial benefit to the nonstruck carriers. However, the liability of each carrier in any one calendar year to make "supplemental" payments was limited to one-half of one

[17] United-Capital Merger Case, 33 C.A.B. 307 (1961), certificates reissued, 34 C.A.B. 725 (1961).

[18] Based on Appendix C to the Examiner's initial decision served March 7, 1969. Where, embraced within the same period of time, there was more than one group of employees on strike on a given airline, only one strike is counted.

[19] Appendix B.

percent of its air transport operating revenue for the previous calendar year.

The carrier parties advanced three principal reasons for adding "supplemental" payments to the agreement. They contended that the "windfall" payments, in most instances, were not sufficient to protect the carriers against the full brunt of union economic pressure. They also noted that several major competitive carriers were not parties to the agreement and their adherence appeared unlikely. Finally, alluding to the jurisdictional dispute between ALPA and FEIA then in progress, they alleged that several of the major transport unions did not exercise restraint in the use of their strike power and that this attitude was expected to continue.

The Board approved the amended agreement, stating:[20]

> * * *. Our examination of the record, compiled in an exhaustive and thorough investigation, leads us to the view that the Pact meets the tests of section 412 and that it is not adverse to the public interest objectives of the Act, but that on the other hand is consistent therewith.
>
> Air carriers are particularly vulnerable to strikes, and the industry has, in the recent past been plagued by strikes. The Pact offers, at a not unreasonable cost for the protection obtained, a substantial measure of relief against the costs of strikes, in this fashion and to this extent contributing to industry stability.

However, contrary to the request of the applicants, the Board limited its approval to three years because, "The years since creation of the Pact have not been typical either

[20] 40 C.A.B. at 561.

as to the industry, plagued with a capacity problem, or labor-management relations, preoccupied with the crew complement issue, and for this reason we shall limit approval to a period of 3 years."[21]

Continental withdrew from the agreement as of December 31, 1966.

The agreement contained the 25 percent "supplemental" payment provision from 1962 to October 1969. During this period there were 11 strikes against carriers party to the agreement.[22] These strikes involved a total of 292 strike days,[23] or an average of 27 days per struck carrier A total of $87,740,000 was paid and received under the agreement, of which total 22 percent comprised "supplemental" amounts.[24]

Previous Proceeding and Events Leading to Present Proceeding

Upon the expiration of the three-year term of approval, the carriers sought renewal of the approval for an indefinite period. The Hearing Examiner issued an initial decision granting the application.

Subsequent to that decision, in October 1969, the carriers amended the agreement, among other things, raising the "supplemental" payments level and making entry into the agreement easier and exit from it harder.

At first, the Board approved the agreement both in the form litigated before the Examiner and as later amended.[25] The Board basically adopted the Examiner's findings

[21] *Id.* at 563. Footnote omitted.

[22] This excludes a five hour strike against Northwest in June 1969.

[23] Appendix C to March 7, 1969, initial decision and Appendix C hereto.

[24] Appendix D.

[25] Order 70-7-114, *supra.*

that the agreement was consistent with national labor policy, contributed to airline stability, had had little, if any, impact on labor-management relations, and had not been shown materially to affect the collective bargaining process. The Board also held that, although the amendments to the agreement strengthened it, they did not change the basic nature of the agreement or add any element that rendered it adverse to the public interest.

On reconsideration,[26] for reasons described earlier herein, the Board vacated its order, to the extent the order approved the agreement, as amended, and remanded the proceeding to the Examiner.

In December 1970, the agreement was further amended to permit participation by local service carriers on the same terms as the trunkline carriers.

As a consequence of the amendments regarding entry into the agreement, Continental and National rejoined effective November 15, 1969, and Western became a member as of August 3, 1970. Delta Air Lines, Inc., and Northeast Airlines, Inc., are the only trunkline carriers not parties to the agreement.

The local service carrier amendments brought Air West, Frontier, Mohawk North Central, Ozark, and Piedmont into the agreement as of January 1, 1971. Texas International joined effective October 5, 1971. The only local service carriers not adhering to the agreement are Allegheny and Southern Airways, Inc.

Two groups of amendments are the center of inquiry, the October 1969 and the December 1970 amendments.

The October 1969 amendments contain five principal features. First, the "standard amount" of payments is increased from 25 percent to a range of 35 to 50 percent of

[26] Order 70-11-110, *supra*.

the struck carrier's normal air transport operating expenses, in decreasing ratio as the length of the strike grows.[27] Second, the annual maximum liability of every party to the agreement is enlarged from one-half percent to one percent of its air transport operating revenue for the previous calendar year. Third, the conditions for entry into the agreement were modified to permit any trunkline carrier to become a party by November 15, 1969, without a waiting period or back payment. Fourth, the provisions for withdrawal from the agreement were amended so that the time period for notice of withdrawal was lengthened from 60 days to one year. Fifth, the arbitration clause was extended to subject the amounts of payments to arbitration in the event of a dispute. Previously, only disputes over the requirement to make or the right to receive payment was subject to arbitration.

The December 1970 amendments opened participation in the agreement to local service carriers on the same terms as the Trunkline Carrier Parties. The amendments, as originally executed, did not cover existing strikes. But, upon the request of Mohawk, the amendment was altered so that Mohawk would receive mutual aid beginning January 1, 1971, with respect to the strike it had been suffering since November 12, 1970. The Trunkline Carrier Parties acceded to the change because they considered Mohawk to be in the same position held by Capital when the agreement was initially made.

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[27] The "standard amount" is equal to the following percentages: (a) during the first 14 days following commencement of the strike, 50 percent of the struck carrier's normal air transport operating expenses; (b) during the next seven days, 45 percent; (c) during the following seven days, 40 percent; and (d) during any subsequent period, 35 percent.

Opinion

As explained by the Trunkline Carrier Parties in their brief, the increase in payment levels had two purposes. The first was to improve the protection afforded struck carriers in view of (1) the growing losses suffered by struck carriers at the 25 percent level, and (2) the deterioration of the carriers' ability to withstand losses. The second purpose was to strengthen the carriers' credibility in labor negotiations in the hope that there might be some tempering of union demands and thus some alleviation of the trend toward ever more costly and inflationary settlements. The annual maximum liability for supplemental payments was raised to finance the higher payment levels. The Trunkline Carrier Parties assert that the adherence clauses of the agreement were changed because, by broadening the membership, the "windfall" aspects of the agreement would be strengthened and reliance on "supplemental" payments would be reduced. In addition, the parties to the agreement believed carriers not parties to the agreement were in a position of special vulnerability to demands for even higher settlement levels which would impair their viability and result in destructive precedents for the parties to the agreement. The changes to the withdrawal provisions emphasized the long-run commitments of parties to the agreement. The Trunkline Carrier Parties state that arbitration terms were altered because there seemed no good reason not to provide for arbitration of questions concerning the amount of payments as well as the right to receive payments.

The Trunkline Carrier Parties note that the Board's decision of July 1970 had an influence on their decision to allow local service carriers to join the agreement. Mohawk and North Central had asked the Board to withhold approval of the agreement until steps were taken to assure

participation by the local service carriers. The Board denied the request "without prejudice to any future agreement of this nature which may be filed."[28] Furthermore, in a concurring statement, Chairman Browne declared, "Mohawk and North Central are free to bring the issue before the Board at a later time if the trunkline carriers fail to afford them the proper consideration." The Trunkline Carrier Parties state that they desire to have the local service carriers participate in the agreement for the same reasons they want the agreement and they think further broadening the coverage should make the agreement more effective. The Local Service Carrier Parties claim they have fully as great a need as the Trunkline Carrier Parties for the protection against strike losses afforded by the agreement.

Since the October 1969 amendments became effective, there have been four strikes affecting members of the agreement.[29] There was a 116-day strike conducted by the Air Line Employees Association (ALEA) against National from January 31, 1970; a 160-day strike by BRAC against Northwest from July 8 to December 14, 1970; a two-day strike by the Air Line Stewards and Stewardesses Association against TWA from October 19 to October 21, 1970; and 154-day strike by ALPA against Mohawk from November 12, 1970, to April 14, 1971. With respect to the last-mentioned strike, 50 days occurred prior to Mohawk's entry into the agreement and 104 days thereafter. The four strikes involved 382 strike days while the struck carriers were members of the agreement, an average of 95 days per struck carrier. Mutual aid receipts and payments totaled $83,585,000[30] of which 59 percent constituted "supplemental" payments.

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[28] Order 70-7-114, Opinion, p. 16.

[29] This does not count the strike called by AMFA against Air West beginning on December 15, 1971, after the hearing ended.

[30] Appendix E.

Positions of Parties

Approval of the agreement, as amended in 1969 and 1970, is supported by the Trunkline Carrier Parties, the Local Service Carrier Parties, and the Bureau. The carriers request approval for an indefinite period with no conditions attached other than those imposed with regard to the preceding agreement. The Bureau recommends that the Board's approval be limited to five years.

All the unions oppose both the 1969 and 1970 amendments and ask for disapproval of the amended agreement. The Six Union Parties expressly request that the disapproval be retroactive. Even if the October 1969 amendments should be approved, the Six Union Parties maintain that participation by local service carriers should be excluded.

Discussion

The history of the mutual aid agreement reflects a constant search for elusive and perhaps unattainable goals. The carriers participating in the mutual aid agreement have sought to shore up their financial positions in relation to union strike activity and to cause the airline unions to moderate their demands. The escalation of mutual aid protection over the years signifies that the carriers believe they have gained their objectives only in part, at best.

Board approval in the past has rested fundamentally on the principle that mutual aid is a legitimate means of self-help in accordance with our nation's labor policy and on the lack of any showing that the agreement was detrimental to the policy objectives of the Act set forth in section 102. In addition, the Board found that the agreement enhanced airline stability and, therefore, was consistent with the aims of the Act.

Opinion

Whatever the earlier accomplishments of mutual aid may have been, the 1969 and 1970 amendments have shifted the balance away from favoring approval of the agreement as it now stands. Thus, the present level of benefits creates a real possibility of a party to the agreement, particularly a weak airline, prolonging a strike for short-term benefits, to the detriment of the traveling and shipping public. Moreover, such level heightens the danger that airlines contributing to the struck carrier may be significantly weakened and thereby impair their public service obligations.

Accordingly, after careful consideration of the evidence of record and the contentions of the parties, the Examiner is persuaded that the amended agreement should be disapproved to the extent the "standard amount" exceeds 25 percent and a contributing carrier's liability in relation to the "standard amount" could be greater than one-half of one percent of its prior year's air transport operating revenues. In addition, local service participation should be eliminated. Finally, the agreement should be amended so that the decision herein would operate prospectively and not apply to mutual aid receipts and payments occurring prior to the effective date of this decision.

Amount of Strike Losses Covered by Agreement

The evidence discloses that the agreement prior to the October 1969 amendments was accomplishing one of its goals; it was adequately covering losses suffered by a carrier during the course of a strike. For example, American was struck by TWU during the period February 27 to March 19, 1969. Taking into account mutual aid, American incurred an estimated loss of $5.6 million before income taxes. Since depreciation and amortization made up $5.3

million of its expenses,[31] the carrier's cash loss was in the neighborhood of $300,000. The $20,311,000 received by American in mutual aid was comprised completely of "windfall" payments. With no resort to "supplemental" payments, mutual aid covered 82 percent of American's operating expenses including depreciation and amortization. Pan American was struck by the International Brotherhood of Teamsters (IBT) from August 9 to 12, 1969. In this situation, as a result of mutual aid receipts amounting to $1,682,000, and although it incurred approximately 56 percent of its estimated normal operating expenses during the strike period, the carrier had an estimated net profit before income taxes of $619,000 after charging $1.1 million of depreciation and amortization to expenses.

The carriers maintain, however, that the losses suffered during the course of a strike are only a portion of the losses incurred by a struck carrier. They assert that before the strike and particularly after the strike has been settled the struck carrier continues to acquire losses[32] because of such factors as start-up costs and diversion of passengers to other carriers. In relation to the TWU strike against American, it is estimated that the post-strike losses for the period March 21 to April 30, 1969, were $11.4 million.[33]

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[31] ALPA contends that the carriers should not be charging depreciation and amortization to expenses when they are not operating. It is unnecessary to pass on ALPA's contention.

[32] By losses it is meant that the post-strike financial results are less satisfactory than would have been the case if there had not been a strike.

[33] It might be noted, however, that in 1969, despite the strike, American realized a net income after special items of $38,468,000, some $3 million higher than in 1968, a year in which no party to the agreement endured a strike.

The estimate is that Pan American lost $2.1 million for the period of August 1969 after operations were resumed.[34] In the cases of National and Northwest, the carriers estimate that, at the 25 percent level, only 40 percent of National's and one-third of Northwest's strike and post-strike losses would have been covered. They maintain that, in the case of the 43-day strike by IAM in 1966 against Eastern, National (not a pact carrier at the time), Northwest, TWA, and United, the "supplemental" payment fund was exhausted almost immediately and the struck carriers recovered only between 14.7 percent and 30.7 percent of their strike losses.

There is no denying that the higher level of benefits bolsters a struck carrier, but the Trunkline Carrier Parties have made no showing that an increase in mutual aid benefits was required to maintain the stability of any of the carriers involved in these strikes. Certainly, the record does not indicate that the 1966 experience established a need for a higher level of payments. As shown in Appendix F, the carriers struck by IAM realized rates of return on investment in 1966 ranging from 7.30 percent by Eastern to 21.88 percent by Northwest. National, which did not belong to the mutual aid agreement at the time, enjoyed a

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[34] The Trunkline Carrier Parties assert that no significant questions were raised at the hearing concerning the procedure followed in determining post-strike losses and the reliability of the carrier strike loss exhibits is not subject to challenge. There can be little doubt that a strike produces an adverse post-strike impact on a carrier, but there is no need to evaluate the validity of the carriers' post-strike loss projections. However, if there were any merit in the claim of the Trunkline Carrier Parties that Northwest's own computation shows only a "paper profit" during the course of the strike (brief, p. 30, second footnote), when that computation is based on actual experience, it would raise a substantial question as to the description and weight, if any, to be accorded the carriers' estimates of post-strike losses, since such estimates reflect a hypothetical situation.

rate of return on investment of 15.87 percent. Indeed, it was not until a meeting among pact members held on August 7, 1969, that the proposal was made to raise the "standard amount". The record is silent as to the events which prompted this meeting, but the meeting was held during the course of the IBT strike on Western (not then a pact member) and just two days prior to the IBT strike against Pan American.

It is evident that in increasing the "standard amount" the Trunkline Carrier Parties have expanded their goal from merely covering strike period losses to meeting, to some extent, post-strike losses as well. The evidence indicates that during a full shutdown a struck carrier can limit its operating expenses to 29.2 percent of the normal level. Under the current agreement, the lowest limit covered is 35 percent and that rate is not reached until the fifth week of the strike. The witness for the Trunkline Carrier Parties who explained the purpose of the amendments testified that in deciding upon the increase the carriers retained the method of calculating mutual aid on the basis of the strike period but were trying to compensate to some degree for the total costs of the strike. The actual financial results during four strikes on carrier parties to the agreement since the October 1969 amendments are consistent with this evidence.

National, although it conducted no operations during the approximately four-month strike by ALEA, with the aid of mutual aid receipts amounting to $27,985,000, earned, during the strike period, net income of $810,000 after $8.4 million in charges for depreciation and amortization.

Northwest, which during the five-month strike by BRAC conducted an average of about 29 percent of its operations,

achieved a net profit before income taxes of $17.9 million during the strike period after deducting $32.8 million in charges for depreciation and amortization. The carrier's mutual aid receipts totaled $47,287,000.

TWA incurred a net loss before income taxes of $879,000 during the two-day strike to which it was subjected in October 1970. That result reflects charges for depreciation and amortization in the amount of $621,000 and mutual aid receipts of $2,452,000. The carrier maintained about 25 percent of its operations during the two days. However, TWA estimated that, if it had not suffered the strike, it would have lost $1,687,000 during the two-day strike period, so that the carrier actually gained $808,000 for the period of the strike.

Mohawk received mutual aid for the first quarter of 1971. It conducted no operations during the strike and received no subsidy for that period. Yet, it had a net profit of $29,000 for this quarter after taking into account $1.8 million in depreciation and amortization and $1.4 million in nonoperating expenses.[35]

Impact of Increased Mutual Aid on Union Demands

The October 1969 amendments have made greater financial support available for struck carriers. However, the other part of the dual objective has not been achieved, that is, the unions have not moderated their demands (at least not significantly) as a consequence of the increased mutual aid. The record is replete with evidence demonstrating the failure of mutual aid in this regard.

The chief labor relations official of National from 1948 through June 30, 1971, testified, with respect to the 1970

[35] This calculation is predicated on mutual aid receipts of $6,170,000 per Exhibit MO-6, p. 3. However, mutual aid payments to Mohawk appear to have totaled only $5,861,000. See Appendix E.

ALEA strike, that the carrier regarded the demands of the union very excessive and the union conduct during the course of the strike as counterproductive. He said that National would have taken the strike even if the carrier were not a party to the mutual aid agreement. Furthermore, he testified that National's membership in the pact did not affect the substance of the settlement made with ALEA. As set forth in the following testimony, this official was astonished at the fortitude of the employees during the course of the strike:[36]

> Q. Mr. Rosenthal, if you know, and it will appear to be a related question, but it is slightly different, what in your opinion enabled ALEA in their position or in your experience, enables other unions to hold out for so long during a work stoppage?
>
> * * * * *
>
> A. In the ALEA dispute, it was a matter of amazement to me. I don't know how they were able to hold out. They did not get strike relief, and yet they did hold out.

In spite of the assistance of mutual aid, this witness characterized the settlement with ALEA as "reasonable-plus", meaning "a settlement which may have been a little less than that would have fallen in the category of reasonableness."[37]

Similarly, Northwest's vice president-personnel, commenting about the BRAC strike, said:[38]

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[36] Tr. 219-220.

[37] Tr. 200.

[38] Trunkline Carrier Exhibit No. 23, p. 12.

Opinion

> Although the Mutual Aid Agreement provided vital financial protection to Northwest during this long and devastating strike, it had nothing whatsoever to do with the existence or duration of the strike, and it played no part in negotiations before or during the strike.

Accenting this statement, the official testified that Northwest considered the BRAC demands so unreasonable the carrier's position probably would have been the same even in the absence of any mutual aid.

Speaking on behalf of Eastern, in response to a question regarding the effectiveness of the increased payments provided under the October 1969 amendments, a witness said:[39]

> Well, it obviously has not been very effective, because the settlements are still inflationary, the most reasonable ones we have.
>
> But what I do say is that we are an extremely vulnerable industry and unless we can strengthen the hand of the carrier in negotiations, you will have even more inflationary settlements than we have had.

It is also significant that the National, Northwest, and Mohawk strikes were three of the longest strikes in the airline industry. Indeed, the strike against Northwest was the longest strike against a party to the mutual aid agreement, that against Mohawk was the second longest, and the strike against National the fourth longest, exceeded only by a 137-day strike by IAM against Northwest from October 11, 1960, to February 24, 1961.

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[39] Tr. 143.

The Trunkline Carrier Parties even concede in their brief that the increased level of payments has been ineffective in inducing the unions to moderate their demands. They said,[40] "Recent settlement levels and the circumstances of the strikes described in the record dispel any notion that the unions will moderate their demands to conform to reduced carrier ability to pay." They commented further:[41]

> *** ALPA Exhibit 20 shows greater increases in employee compensation since Mutual Aid than before and dramatically greater increases since the 1969 Amendments. Moreover, updated versions of exhibits introduced at the earlier hearing show that airline employees not only continue to lead employees in all other major domestic industries in average hourly wages, but have increased their margin in both absolute and percentage terms.

Nevertheless, the Trunkline Carrier Parties argue that these experiences do not prove that the increased level of payments is without impact on the bargaining process. They contend that the National and Northwest strikes were controlled by the supervening influence of inter-union rivalry. Furthermore, they claim that the unions are likely to increase their demands when they conclude that a hard-pressed carrier is in no position to resist them. The Trunkline Carrier Parties aver that settlements since the 1969 amendments, generally involving lucrative increases in compensation, were made at a time of inflationary settlements throughout the economy, and they speculate that the settlements might have been even higher in the absence of

[40] Brief, p. 32.

[41] Brief, pp. 37-38.

the amendments. They furthur conjecture that the tempering effect on union demands caused by improvement in the airlines bargaining credibility is likely to be felt over the long run.

It is apparent that the arguments of the Trunkline Carrier Parties on the moderating effect of increased mutual aid do not rest on the long experience under the mutual aid agreement but on pure surmise. In the light of the objective evidence, their contentions cannot be accepted.

There can be little doubt that inter-union rivalry presently affects carrier-labor relations particularly with respect to ground employees. But the record shows that inter-union rivalry is not a new feature in carrier-labor relations. As the Trunkline Carrier Parties themselves point out, the ALPA-FEIA controversy lasting from 1958 to 1962 was an aspect of that contest. Furthermore, with or without increased mutual aid, the carriers will continue to be confronted with the problem of inter-union factionalism in the future.

The carriers have pointed to the Western-IBT strike in 1969 and the settlement thereof as an example of the use of a settlement on a carrier in poor financial condition as leverage for an even larger settlement in bargaining with other carriers. However, Western is by no measure a weak carrier. Rather, the data show that it ranks among the more profitable carriers and that it is having a satisfactory recovery from the economic recession which hit the industry in the past few years.[42] Moreover, even more

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[42] See Appendix F. The Examiner in the *American-Western Merger Case* said, "[Western's] financial status is far removed from comparison with the distress situations that have previously come before the Board in merger cases. On the contrary, whether viewed in the absolute or in relation to the other domestic carriers, it would

pertinent, is Western's experience after it joined the mutual aid agreement. Western adhered to the agreement because the carrier felt that without the support of mutual aid it was too vulnerable to strikes and excessive union demands. The carrier considered the increases it granted as a result of the IBT strike inordinate and as setting an adverse industry precedent. Nevertheless, on March 23, 1971, after it was a full-fledged pact member, Western signed an agreement with ALPA[43] which the Western witness described as "very highly favorable [for the pilots]. It is an inflationary settlement, very inflationary, which involves not only costs, direct costs, but loss of productivity."[44]

The Trunkline Carrier Parties urge that the Mohawk strike illustrates that unions are more likely to increase their demands where they conclude that a hard-pressed carrier is in no position to resist them. There is no probative evidence that ALPA's demands took into account Mohawk's financial condition. Nor does the contention of the Trunkline Carrier Parties square with such evidence as is available.

For example, analysis of rates paid as of December 31, 1971, pursuant to IAM agreements with Braniff, Continental, Eastern, National, Northeast, Northwest, TWA, and United does not demonstrate that Northeast, the weakest trunkline carrier, is a bellwether for union settlements.[45] In the category of lead inspector (only Northeast, North-

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have to be adjudged a very healthy company. While it had some basis for a less than rosy outlook in the months preceding the active negotiations with American it is now quite apparent any basis for concern was short lived." Recommended Decision, p. 35.

[43] There was no strike.

[44] Tr. 348.

[45] Northeast has not incurred a strike since 1958.

west, and TWA have that category), Northeast pays the highest rate, $6.20 per hour, and TWA the lowest, $6.12 per hour. But in the category of inspector, a classification on all eight carriers, Northwest pays the highest rate, $6.00 per hour, and Northeast the lowest, $5.87 per hour. In the mechanic-lead or crew chief group, of the eight carriers, Northeast pays the second lowest rate, $5.87 per hour. The highest rate is paid by National, Northwest, TWA, and United, $5.97 per hour. In the category called mechanic, Northeast and Eastern pay the lowest rate, $5.09 per hour, with National, TWA, and United paying the highest rate, $5.18 per hour.

It should not be overlooked that the longest strike against a mutual aid agreement member—the 160-day strike by BRAC against Northwest—occurred after the October 1969 amendments and was suffered by the carrier most relatively profitable of all the pact members.[46] And the 116-day strike incurred by National was called against another very profitable member.

At any rate, whatever the nature of the problems presented by carrier-union labor relations may be, the dilemma has not been circumvented through increased mutual aid.

Dangers of Increased Mutual Aid

Section 412(b) of the Act requires the Board to disapprove any agreement which the Board finds to be adverse to the public interest or in violation of the Act. In evaluating the public interest, the Board must consider, among other things, the factors set forth in section 102 of the Act. That section contains the congressional policy of promoting, encouraging, and developing our nation's air transportation system.

[46] Appendix F.

Opinion

Up to this point, the discussion would not warrant disapproving the higher level of mutual aid. The increased level of mutual aid support for struck carriers helps buttress such carriers' financial stability and thereby contributes to the developmental purposes of the Act. The fact that such aid has not been effective in inducing unions to moderate their demands may be disappointing but that circumstance alone does not undercut mutual aid as a legitimate means of self-help under our national labor policies. However, a closer examination of the record in light of the Board's statutory obligations discloses that the increased level of mutual aid creates certain perils which may undermine the objectives of the Act. These risks are so serious as to justify disapproving the increased level of payments.

Potential Danger of Longer Strikes

The record indicates that mutual aid, even after the October 1969 amendments, has not been a significant factor in either a carrier's decision to suffer a strike, or during the course of a strike, its determination when to settle.[47] This situation prevails because mutual aid has been ineffective in achieving the goal of persuading unions to moderate their demands.

Nonetheless, the significant consideration is that the increased mutual aid is intended to encourage a carrier to incur a strike and to withstand union pressures during the course of a strike in order to avoid surrendering to what the carriers believe are unreasonable demands. As the Trunkline Carrier Parties' witness explaining the

[47] However, Mohawk's chief executive officer at the time of the strike conjectured that without mutual aid the carrier might have settled or elected the merger route sooner. There is no indication that the higher level of mutual aid flowing from the October 1969 amendments had any bearing on this testimony.

amendments said, "We also had in mind the necessity of increasing the amount of financial protection provided to a struck carrier so that it would be in a position realistically to resist unreasonable demands made under threat of a strike."[48]

Of course, no carrier is likely to protract a strike indefinitely because of the current level of mutual aid which is available. There are too many pressures[49] on a carrier to produce such a result.

But, in the short-run, a carrier can utilize the higher level of increased payments as a consideration in determining when it is opportune to settle a strike. One of the Trunkline Carrier Parties' witnesses testified that when a carrier commences operations after a strike it is largely a matter of the carrier's managerial judgment how rapidly it will return to full operations. An important circumstance in reaching this decision is the season of the year. This witness also stated that the carriers realize the availability of "windfall" payments during the post-strike period might affect a carrier's judgment regarding which flights it should resume first and constitutes one of the reasons the carriers have so far rejected direct mutual aid for that period.

These types of considerations are present during the course of a strike, and it is not far-fetched to conclude that, with the higher level of "supplemental" benefits now available, could influence management's judgment as to when it is timely to settle a strike. It was earlier noted that

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[48] Trunkline Carrier Exhibit No. 20, p. 5.

[49] Among these pressures are the adverse impact of a prolonged strike on the going concern capacities of the carrier, the increase in post-strike losses as the strike becomes more lengthy, and the urgings of governmental authorities, the traveling and shipping public, and nonstriking employees.

TWA was financially better off during the two-day strike it incurred in 1970 than if it had fully operated on those days. The really dramatic picture is shown when a weak carrier is involved. Thus, for the quarter ended March 31, 1971, the period for which Mohawk received mutual aid,[50] without any operations or subsidy the carrier enjoyed an operating profit of $1,445,000 and a net income after special items of $29,000.[51] In contrast, for the three months ended March 31, 1969, on the basis of its Form 41 reports, the carrier realized from its operations (including $592,000 in subsidy) an operating profit of only $890,000. Furthermore, after special items it suffered a net loss of $421,000.[52]

It is evident, therefore, that the higher level of mutual aid payments may sway a carrier's decision as to when it should settle a strike, to the detriment of the public utilizing air transportation.

Adverse Impact on Paying Carriers

The carriers complain that the unions, in formulating their demands, pay no heed to the financial condition of the carrier with which they are bargaining. The mutal aid

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[50] "Supplemental" payments comprised 93 percent of the total.

[51] The allegation of the Trunkline Carrier Parties and of the Local Service Carrier Parties that the continuation of the Mohawk strike after the carrier became a party to the mutual aid agreement cannot be attributed to mutual aid but rather stemmed from ALPA's refusal to compromise its demands further reflects the ineffectiveness of the increased level of mutual aid payments as a force influencing the unions to moderate their demands.

[52] Data for the first quarter of 1970 were not utilized for comparison purposes because Mohawk's operations were adversely affected by the controller sick-out in late March. For that quarter, Mohawk had an operating loss of $1,158,000 (after taking into account $470,000 in subsidy) and a net loss after special items of $2,570,000. It is noteworthy, nevertheless, how much better off Mohawk was when it suffered the strike

agreement has the same kind of defect. It does not take into account the financial conditions of the receiving and contributing carriers. The record indicates no important attention was paid to this factor when the increased level of payments was discussed. Indeed, none of the carrier witnesses participated in studies of the financial impact of the increased level of payments or saw any studies on this subject.

The principal beneficiary of mutual aid in 1970 was Northwest, relatively the most profitable of the parties to the mutual aid agreement. In fact, although it conducted heavily reduced operations during five months of the year because of the strike by BRAC, mutual aid enabled Northwest to attain the highest rate of return on investment of any of the carriers belonging to the agreement.[53] Moreover, with the additional assistance of the income tax laws, Northwest actually enjoyed a greater net income after special items in 1970 than it achieved in 1969. Nor would Northwest have been deprived of a net profit for the year if the 25 percent "standard amount" level had still been in effect. On the other hand, National, the carrier with the worst 1970 rate of return on investment of the pact carriers, a negative figure, and which itself received mutual aid of $27,985,000, 52 percent of which were in "windfall" payments, was required to pay to Northwest, $1,246,000, all of which were "supplemental" payments. Similarly, TWA received $2,452,000 in mutual aid in 1970, 67 percent of which constituted "windfall" amounts. Next to National, it had the worst return on investment, also a negative figure. But it had to pay a total of $8,399,000 to National and Northwest, of which some 85 percent comprised "supplemental" payments. In these circumstances, the contention of the Trunk-

[53] Appendix F.

line Carrier Parties that the carriers were able to make the payments called for by the agreement without impairment of their financial condition is hollow.

A review of mutual aid data over the life of the agreement again shows that the greatest recipients have been among the relatively more profitable members. Thus, the recipient of the largest amount of mutual aid has by far been Northwest, which has had net receipts of $49,871,000.[54] Yet, in eight of the ten years from 1961 through 1970, Northwest had the highest rate of return on investment of any of the present trunkline pact members.[55] National was the next highest recipient of pact aid, a net of $26,185,000. But, over the period 1961 through 1970, it had the highest rate of return on investment in one year, the second highest in four years, and in only two years was not among the top half of the present group of trunkline members of the pact.

On the other hand, the highest contributor under the agreement has been United, with net payments in the amount of $28,223,000. United has been in the top half of the ten present trunkline members of the pact only once in terms of rate of return on investment during the ten-year period reviewed. That was in 1969 when the carrier reached fifth place. The carrier's rate of return on investment over this period did not exceed 9.82 percent and was as low as 0.59 percent.[56] Other evidence of the adverse effect on

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[54] Appendix G.

[55] Appendix F.

[56] In General Passenger-Fare Investigation, 32 C.A.B. 291, 308-309 (1960), the Board found reasonable an overall rate of return on investment of 10.25 percent for the Big Four carriers. Recently, in Domestic Passenger-Fare Investigation, Phase 8—Rate of Return, Order 71-4-58, April 9, 1971, Opinion, p. 32, reconsideration denied, Order 71-7-43, July 8, 1971, the Board found the reasonable rate of return for domestic trunkline passenger services to be 12 percent.

United of mutual aid is reflected in the carrier's working capital. As of December 31, 1968, United's working capital amounted to $45,994,000. At December 31, 1970, the carrier's working capital totaled $17,520,000. The carrier estimated that if there were no mutual aid agreement its working capital would have been $47,225,000 at December 31, 1970. The next highest payer of mutual aid has been Pan American, in the net amount of $21,846,000. Pan American has been in the top half of the pact members, in terms of rate of return on investment, four times in the ten-year period, but since 1963, it has reached the top half only once, fifth place in 1967. The carrier had a negative rate of return on investment in 1969 and a return of only 0.51 percent in 1970.[57]

The defect in the mutual aid agreement of ignoring the financial conditions of the contributing carriers has been intensified by the increased emphasis on "supplemental" payments. Clearly, broadening the pact membership has not overcome the problem. It is significant that of the $187,485,000 changing hands under the agreement since its inception and through June 1971, 45 percent is attributable to the four strikes since the October 1969 amendments. The extraordinary shift in balance toward "supplemental" payments was pointed out earlier. In fact, 27 percent of the total of mutual aid payments since the beginning of the pact is reflected in the $49,688,000 in "supplemental" payments made in connection with these four strikes. Whatever equity there may be in competing carriers surrendering the profits from additional gains because of a strike on a brother airline does not extend to "supplemental" pay-

[57] Nevertheless, in the latter year, Pan American paid out $9,404,000 under the mutual aid agreement, 76 percent of which was in "supplemental" payments.

ments which are imposed regardless of the competitive relationship between the struck carrier and the other members of the agreement.

With respect to the hardship on contributing carriers of the obligations of the mutual aid agreement, it is pertinent that the one percent limitation is not a true ceiling on payments because of the "windfall" payments. For example, while the $5,894,000 in "supplemental" payments made by Eastern in 1970 are clearly within the one percent standard, counting "windfall" payments, the carrier paid out $19,319,000, or somewhat in excess of two percent of its 1969 air transport operating revenue.[58] Moreover, since the one percent limitation was not reached in 1970, if the strike situation should become worse, the impact on the contributing carriers would be even greater.

The record does not establish that any carrier has incurred or prolonged a strike because of the increased level of mutual aid. Nor does it demonstrate that the viability of any carrier has been critically threatened because of the higher level of contributions required under the amended agreement. But the dangers are apparent and outweigh the benefits that may be obtained by struck carriers from the additional financial support afforded by the augmented level of mutual aid.[59]

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[58] Appendix H. The total payments of Continental, United, and Western also exceeded one percent of the individual carrier's 1969 adjusted transport operating revenue. It might further be noted that Western's membership in the agreement did not become effective until August 3, 1970, so that the carrier made no payments to National and no payments for the first 25 days of the IBAC strike against Northwest.

[59] Also weighing against a current need for increased mutual aid as a tool for persuading the unions to temper their requests is the fact that wage-price guidelines are currently in effect and increases in wages and prices are subject to Governmental approval.

Local Service Carrier Amendments

Once before the Board entertained the question of whether the local service carriers should be permitted to participate in mutual aid. The Board disapproved the mutual aid agreement as adverse to the public interest because it found there was a substantial prospect that the local service carrier's subsidy requirement would be increased through its participation in the agreement.[60] The Board stated that its findings and conclusions were without prejudice to the submission of a revised agreement containing provisions assuring against any possible subsidy burden on the local service carrier.

The Local Service Carrier Parties claim the condition which the Board laid down in the *American-Mohawk* case is met under present circumstances. Thus, under the most recently effective class rate formula[61] a local service carrier's subsidy would be unaffected by either mutual aid payments or mutual aid receipts. In addition, it is contended that local service carriers stand to gain considerably more in the way of financial benefits under the agreement than they would be called upon to pay out because of the operation of the "windfall" provisions of the agreement.

It is true that under the most recent versions of the class rate formula, so long as a local service carrier remains on a closed rate, its subsidy is untouched by mutual aid receipts or payments. Nevertheless, adherence to the mutual aid agreement hardly seems consistent with the statutory scheme particularly as reflected in section 406 of the Act.

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[60] Mutual Aid Agreement between American Airlines, Inc., and Mohawk Airlines, Inc., Order E-24213, September 23, 1966.

[61] Investigation of the Local Service Class Subsidy Rate, Order 71-3-7, March 1, 1971.

For example, as in the case of Mohawk, the class rate formula provides no funds for a carrier which does not operate, even if the suspension of operations is caused by a strike. If some service were conducted, subsidy would be available to sustain the operations which were performed. Yet, under the mutual aid agreement, payments are made for operations which are shut down and not entitled to subsidy support. Thus, the other local service carrier parties to the agreement made payments to Mohawk from their working capital, which included subsidy receipts, although under the class rate formula that carrier was not authorized direct subsidy from the Government. If a trunkline carrier were on strike, while none of those carriers presently receive subsidy, through the payments of the Local Service Carrier Parties the trunkline carriers would be securing a measure of subsidy help.

If a local service carrier should be on an open rate when it suffers a strike, it has recourse to the subsidy provisions of the Act.[62] The Board must determine the carrier's need in light of the developmental purposes of the Act under the statutory standards of honest, economical, and efficient management.[63] To the extent the criteria are met, strike losses are underwritten.[64] Therefore, mutual aid would be unnecessary. With regard to strike losses which the Board finds are not allowable under the statutory standards, it would be incongruous for such losses to be alleviated by

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[62] Section 406.

[63] American Overseas Airlines v. Civil Aeronautics Board, 254 F. 2d 744 (D.C. Cir. 1958).

[64] Transatlantic Final Mail Rate Case, Reopened, 42 C.A.B. 195 (1965), *aff'd., sub nom.*, Trans World Airlines v. Civil Aeronautics Board, 385 F. 2d 648 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 944 (1968).

other, subsidized carriers.[65] Accordingly, from a conceptual viewpoint, the extent of the exposure of the local service carriers under the agreement is immaterial.

Nevertheless, the Local Service Carrier Parties argue that the cost of belonging to the pact is reasonable. They contend that the maximum amount payable in one year would range among the participating local service carriers from about $500,000 to around $750,000.[66] As previously indicated, such a contention does not take into account the effect of "windfall" payments. Moreover, this contention overlooks the impact on individual carriers. As an example, the local service carrier party to the agreement subject to the maximum exposure is Frontier, a carrier which has never undergone a strike. The exposure of about $750,000 is significantly greater than the carrier's operating profits in 1969 and 1970.[67] The Board has lately permitted Frontier to suspend service over major routes because among other things, the carrier's financial condition is "so serious."[68] Adherence to the pact, therefore, reflects not only a substantial gamble on Frontier's part but also, if the Board

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[65] In the one case directly dealing with the matter, the Board disallowed payments made under the mutual aid agreement by a subsidized carrier in determining that carrier's mail pay need. Pan American Mail-Rate Case, Reopened, 35 C.A.B. 540, 555 (1962).

[66] These amounts would be reduced in half under the provisions of the agreement in effect prior to October 31, 1969.

[67] In 1969 and 1970, Frontier had operating profits of $479,000 and $415,000, respectively, and in 1968 it suffered an operating loss of $1,921,000.

[68] Frontier Airlines, Inc., Suspension Applications, Order 72-1-100, January 28, 1972, p. 7. This example also mirrors the chief flaw in the agreement, the absence of consideration of the financial conditions of the paying carriers. Frontier paid Mohawk $50,000 in 1971 pursuant to the mutual aid agreement, all of which constituted "supplemental" payments. This amount is larger than the payment of any other local service carrier.

were to ratify Frontier's participation, a similar speculation by the Board.

The Local Service Carrier Parties urge, however, that as a group they stand to gain much more in the way of benefits than they may assume in obligations. If the Mohawk situation should be representative, this claim is valid. Of the $5,861,000 in mutual aid received by Mohawk, $5,626,000, or 96 percent, was paid by the trunkline carrier members of the agreement. Moreover, the trunkline carriers supplied the entire amount of the "windfall" payments, $414,000, and 96 percent of the "supplemental" payments.

The financial results of the trunkline carriers in the last several years indicate that they can ill-afford such a drain on their resources.[69] Thus, the very argument of the Local Service Carrier Parties that their strike losses would be borne largely by the nonsubsidized trunkline carriers weighs against sanctioning local service carrier membership in the mutual aid agreement.

The Local Service Carrier Parties claim that their vulnerability to strikes has resulted in increasingly costly wage settlements in recent years. They point to evidence that the average annual salary on local service carriers rose 54 percent from 1965 to 1970 compared with 48 percent on the trunkline carriers. They also note evidence indicating that settlements on local service carriers since

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[69] The rate of return on investment of the Trunkline Carrier Parties for the period 1967 through 1970 was as follows:

Year	*Rate of Return*
1967	8.0%
1968	5.4
1969	4.2
1970	1.5

Source: Trunkline Carrier Exhibit No. 36.

October 1968 have resulted in an average increase in annual continuing costs of 12.2 percent as compared with 10.7 percent on trunkline carriers. [70] The Local Service Carrier Parties conclude from these data that the unions have been more successful in pressing inflationary demands upon the local service industry than upon the trunkline industry and attribute the reason to knowledge on the part of the unions that local service carriers cannot afford to take strikes.

These contentions are unpersuasive. Since 1965 the equipment of the local service carriers in the small jet category has become comparable to that of the trunkline carriers to a large degree. Moreover, the local service carriers have extended their operations considerably and are operating comparable service over route segments formerly reserved for trunkline carriers. These factors explain in large part the narrowing of the salary gap between the local service and trunkline carriers. In addition, Mohawk's actions exemplify the fact that the local service carriers have not surrendered to a strike threat when they believed suffering a strike was justified.

The record does not display an urgent need on the part of local service carriers to join the mutual aid agreement. Nor does it reveal that local service carriers are especially inviting targets for union attempts to establish new industry precedents. Rather, it shows that mutual aid is not sufficient to overcome the difficulties of a carrier with deep-seated financial inadequacies and that, where a carrier is more firmly braced, the carrier can rebound

[70] The record shows that, as of December 31, 1971, local service carriers having contracts with IAM were paying hourly rates in many classifications equaling or exceeding the rates paid by the trunkline carriers.

successfully from the adverse effects of a strike without mutual aid.[71]

The trauma of Mohawk[72] demonstrates that the heavy financial advantages of mutual aid to a struck carrier are insufficient to avoid the consequences of the lack of adequate financial underpinning. Even with mutual aid, the carrier has resorted to the merger path to resolve its problems.

On the other hand, while a 30-day strike on Piedmont in 1969 took a heavy toll of the carrier, it bounced back strongly. The carrier estimates that it suffered an operating loss for the period of the strike in the amount of $1,770,[illegible]. The operating loss for the year was $161,341. [illegible] realized an operating profit [illegible],922 in 1970, more than twice the 1968 operating profit of $740,207. Instead of the union attempting to establish an industry-wide precedent through a local service carrier, this situation involved an attempt to enforce on a local service carrier an arbitration decision applicable to a trunkline carrier (United) requiring the use of three-man crews on the Boeing 737.[73]

Ozark overcame the adverse effects of a strike even more successfully. Ozark was struck for five days in 1970. The carrier estimates it lost (during and post-strike) $838,085 as a result of the strike. Nevertheless, it enjoyed an operating profit of $1,361,688 in 1970, a complete reversal of its 1969 picture when it incurred an operating loss of $1,195,493.

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[71] The rate of return on investment [illegible] carrier's subsidy contains recognition for the [illegible] Final Mail Rate Case, Report, 42 C.A.B. at 213.

[72] And of Capital.

[73] The experience of Air W[illegible] does not safeguard a local service carrier [illegible]

In light of the foregoing, approval of local service carrier participation in the mutual aid agreement is not consistent with the public interest.

Disapproval Should Operate Prospectively

Section 4 of the mutual aid agreement provides, in part:[74]

> This Agreement shall become effective as of October 31, 1969, and shall be filed with the CAB. If this Agreement shall be disapproved by the CAB, it shall terminate forthwith to the extent disapproved, and payments made hereunder, to the extent they are affected by the terms of such disapproval, shall become and be treated as obligations owing from the receiving party to the paying party.

Section 3 of the local service carrier amendments reads similarly.[75]

In light of the decision herein, if the provisions of the agreement were permitted to take effect, all payments which exceed the 25 percent "standard amount" provision, as the agreement read prior to October 31, 1969, would have to be returned. National would be required to give back $9,459,000, Northwest to return $15,368,000, and TWA to restore the entire amount of "supplemental" payments, $805,000, to the paying carriers. In addition, Mohawk would have to turn back the complete amount of mutual aid it received, $5,861,000.

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[74] Appendix A, p. 7.

[75] "[T]his Amendment shall be filed with the CAB upon execution. If this Amendment is disapproved by the CAB, in whole or in part, it shall terminate forthwith, and payments made hereunder shall become and be treated as obligations owing from the receiving party to the paying party." *Id.* at 11.

Opinion

The Board's order of remand explicitly placed in issue the question of whether disapproval of any of the amendments should operate prospectively only. The Six Union Parties are the only parties to address that issue directly. They contend that disapproval should be applied retroactively on the ground that there is no sound reason why a carrier should be rewarded for having engaged in conduct adverse to the public interest and the industry while it seeks approval of its agreement. The Six Union Parties maintain that prospective disapproval simply encourages irresponsibility in this area. The Bureau urges that, apart from the general question of local service carrier participation, Mohawk's receipt of pact benefits should not be disapproved for a strike in progress at the time the carrier entered the agreement.[76]

The Examiner is convinced that, to the extent the amendments of the mutual aid agreement are rejected herein, the disapproval should function prospectively. It cannot be overlooked that the Board initially approved the October 1969 amendments, and even when it decided to remand the proceeding for a further evidentiary hearing declared, "We are not presently persuaded that our earlier determination was in error."[77] Moreover, implementation of the amended agreement pending decision was fully lawful.[78] In these circumstances, it would require compelling circumstances to justify applying this decision retroactively.

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[76] ALPA states that it recognizes disapproval of the amendments does not necessarily require return of the amounts paid as received, but it does not set forth a position on this question.

[77] Order 70-11-110 at 2.

[78] Airlines Mutual Aid Pact, Order 71-3-183, March 30, 1971.

Of course, as has been indicated, the amended agreement itself renders the receiving carriers liable to the extent the agreement is disapproved. But the effectuation of these provisions would be a disservice to the public interest. Some of the payments were made as long as two years ago with apparent anticipation by both paying and receiving carriers that the amended agreement would be approved. Both paying and receiving carriers conducted their operations and drew their financial plans on that basis. To enforce a pay back at this point in time could cause substantial detriment to the recipients of mutual aid. Moreover, in the final analysis, there is no showing that requiring a reversion of mutual aid receipts made excessive or disapproved by this decision would advance any statutory objective.

No sound reason appears to uphold the Six Union Parties' contention that disapproval prospectively would promote irresponsibility. Certainly the impact of prospective disapproval on the carriers making the mutual aid payments should discourage carriers in the future from indiscreet action in relation to agreements pending Board approval under section 412.

Mutual Aid Agreement Approved if Modified

The mutual aid agreement stands before the Board as amended October 31, 1969, and December 10, 1970. As has been discussed heretofore, the increases in the "standard amount" and concomitant potential liability of the paying carriers and the admission of the local service carriers are inconsistent with the objectives of the Act. If the agreement were modified to conform with the instant decision, it would be substantially in the form approved by the Board

for an indefinite period.[79] Accordingly, the mutual aid agreement shall be approved subject to the conditions previously imposed by the Board[80] and to modification of the agreement by the parties thereto in accordance with the requirements of this decision.

Ultimate Findings

On the basis of the foregoing facts and considerations and all of the evidence of record,[81] it is found that the mutual aid argeement is not adverse to the public interest or in violation of the Federal Aviation Act of 1958, as amended, and should be approved, subject to the following conditions:

1. The agreement shall be modified so that:

a. In section 1(B)(1), the "standard amount" shall not exceed 25 percent;

b. In section 1(B)(2), the obligation of any party to the agreement to make additional payments shall not exceed one-half of one percent of its air transport operating revenue for the prior calendar year;

c. In section 4, no carrier receiving mutual aid subsequent to October 31, 1969, and prior to the effective date of this decision as the decision of the Board shall be obligated to repay amounts received in excess of the amounts

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[79] Order 70-7-114, reconsideration denied in part, Order 70-11-110. The ingress and egress features and the arbitration provisions of the agreement would be different. But these changes have not been directly litigated and are not adverse to the public interest or in violation of the Act.

[80] Order 70-7-114.

[81] Contentions of the parties not discussed herein have been considered by the Examiner and Board after the decision.

receivable pursuant to the modifications prescribed herein; and

d. The December 10, 1970, amendment shall be eliminated, provided that no carrier receiving mutual aid pursuant to such amendment prior to the effective date of this decision as the decision of the Board shall be obligated to repay such receipts;

2. Not later than ten days after the effective date of this decision as the decision of the Board, there shall be filed with the Board amendments to the agreement in conformance with the moifications mandated in paragraph 1. above;

3. The approval shall not be deemed a determination of the reasonableness of the financial provisions of the agreement for future ratemaking or other regulatory provisions under the Act;

4. The approval shall not affect the rights and obligations of the parties, or of their employees, under the Railway Labor Act;

5. In accounting for the amounts due to others and the amounts due from others under the agreement, the carrier parties shall comply with the general accounting and reporting requirements for financial and statistical information as prescribed by Part 241 of the Economic Regulations (Uniform System of Accounts and Reports) or as otherwise may be directed by the Director of the Board's Bureau of Accounts and Statistics. The carrier parties also shall submit such other information relating to the operations of the agreement as may be reasonably required by the Director of the Board's Bureau of Operating Rights; and

6. Copies of all arbitrator's decisions and awards issued under this agreement shall be filed with the Board's Docket Section within 15 days of service thereof on the carrier parties; and briefs and other documents filed in the arbitration proceeding by carrier parties shall be made available to the Board for examination upon request.

It is further found that the motion of the Local Service Carrier Parties to strike portions of the joint brief of APA and AMFA should be granted.

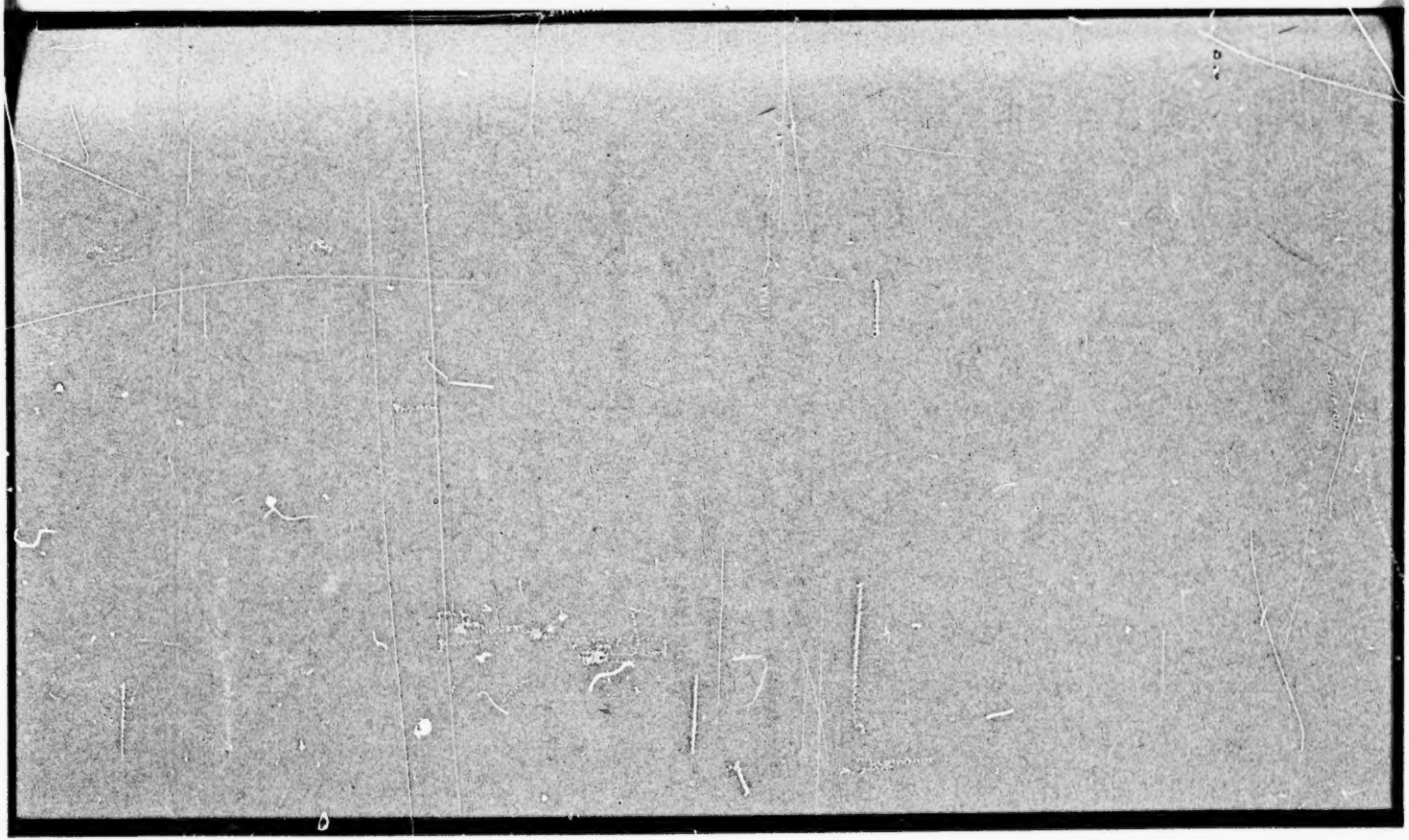
An appropriate order is attached.

APPENDIX E

Pertinent Sections of:

Railway Labor Act, as Amended,
45 U.S.C. §152 (First), (Ninth)

Federal Aviation Act of 1958, as amended,
49 U.S.C. §1371, §1382



Railway Labor Act, as amended (45 U.S.C. 152)

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may par-

ticipate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

The Federal Aviation Act of 1958, as amended (49 U.S.C. 1371)

"(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transporation.

"(k)(4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with sections 181-188 of Title 45."

The Federal Aviation Act of 1958, as amended (49 U.S.C. 1382)

"(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

"(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it."